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Priekšvārds

Pie lasītājiem ir nonācis kārtējais elektroniskais juridiskais žurnāls *Socrates*, kas pēc būtības ir jubilejas numurs, jo ir pēc kārtas divdesmitais. Jāatzīst, ka žurnāls attīstās un pilnveidojas gan kvalitatīvi, gan arī kvantitatīvi. Ir jūtama *Socrates* iekļauto rakstu internacionalizācija. Autori pārstāv piecas valstis un savos rakstos analizē daudzveidīgo un interesanto pieredzi tiesisko un sociāli politisko jautājumu izpētē. Rakstu krājumā ir ietverts plašs problēmu loks. Autori ir mēģinājuši vispusīgi un dziļi apzināt pētāmos jautājumus, un tas ir būtiski palielinājis žurnāla apjomu.

Ph.D. ***Laura Ratniece*** analizē metodoloģiski nozīmīgu jautājumu par starpdisciplinaritāti juridiskos pētījumos. Autore atzīst, ka Latvijā starpdisciplināri pētījumi tiesību zinātnē vēl nav plaši izplatīti, tāpēc aplūko vairākus pamatjautājumus, no kuriem galvenais – kas tad ir starpdisciplinārs pētījums tiesību zinātnē.

Satversmes tiesas priekšsēdētāja *Dr. iur.* ***Sanita Osipova*** skata problēmu, kas tiesību zinātnē ir maz pētīta, t. i., par sodītu personu kā valsts stigmatizētu grupu Satversmes tiesas judikatūrā. Autore uzsver, ka Satversmes tiesa ir atzinusi par Satversmei neatbilstošām normas, kas sodītām personām ierobežo atsevišķas tiesības. Sodītas personas tiek stigmatizētas uz mūžu. Tādējādi, nepamatoti ierobežojot sodītu personu iekļaušanos sabiedrības dzīvē, sabiedrība sevi nevis pasargā, bet gan apdraud.

Pēdējie divi gadi aizrit Covid-19 ietekmē. Tiesiskā aspektā būtisks ir problēmjautājums par līdzekļiem, kas tiek izmantoti pandēmijas ierobežošanai. Viens no šādiem radikāliem līdzekļiem ir ārkārtas stāvokļa ieviešana. *Mg. iur.* ***Ieva Bērziņa*** (Latvija) un ***Coline Jeancourt-Galignani*** (Francija) ir pētījušas un salīdzinājušas Latvijas, Francijas un Beļģijas valsts ārkārtas stāvokļa regulēšanas pieredzi. Autores atzīst, ka ārkārtas stāvokļa institūts un tā tiesiskais regulējums ir svarīga katras valsts nacionālās tiesību sistēmas sastāvdaļa, jo tas ir mehānisms, kas palīdz stiprināt valsts drošību ārēju un iekšēju briesmu gadījumā. Ārkārtas stāvokļa tiesiskā regulējuma Latvijā, Francijā un Beļģijā salīdzinošā analīze veido priekšnosacījumus nacionālā tiesiskā regulējuma pilnveidei minētajā jomā.

Dr. iur. ***Marta Urbāne***, *Dr. oec.* ***Inna Dovladbekova*** un *Dr. oec.* ***Anželika Berķe-Berga*** ir aplūkojušas zināmā mērā ar Covid-19 saistītu problēmu – tāldarba juridiskos aspektus. Covid-19 situācija, moderno tehnoloģiju attīstība un jaunu paaudžu ienākšana darba tirgū veicina to, ka tāldarbs kā darba attiecību veids strauji kļūst arvien nozīmīgāks. Autores secina, ka plānotās izmaiņas Latvijas Darba likumā attiecībā uz tāldarbu nerada tiesisko noteiktību darba attiecībās ārkārtas situācijās, tostarp Covid-19 krīzē.

Virkne *Socrates* šajā krājumā iekļauto rakstu ir aplūkotas starptautisko tiesību, attiecību vai sadarbības problēmas. *Ph.D.* ***Olenas Agapovas*** (Ukraina) publikācija atsedz Ukrainas un Latvijas starptautisko tiesisko sadarbību. Abu valstu tieslietu ministriju darbības analīze, kas balstīta uz tiesiskā regulējuma, institucionālās struktūras un vadības sistēmu izpēti, ļāvusi identificēt galvenās starptautiskās sadarbības formas un izdarīt būtiskus secinājumus. Starptautiskā tiesiskā sadarbība starp Latviju un Ukrainu attīstās un pilnveidojas.

Lietuvas jaunie tiesību zinātnieki ***Mykolas Kirkutis*** un ***Vigintas Višinskis*** vērš uzmanību uz ārvalstu spriedumu atzīšanas un izpildes problēmaspektiem, tostarp uz sabiedriskās kārtības klauzulas piemērošanu Eiropas Savienībā. Raksta autori analizē arī sabiedriskās kārtības klauzulas saturu.

Starptautisko tiesību jomā doktora zinātniskā grāda pretendente ***Anete Božе*** apskata Direktīvu 2007/64/EC (t. s. pirmo Maksājumu pakalpojumu direktīvu PSD1) un Direktīvu 2015/2366 (t. s. otro Maksājumu pakalpojumu direktīvu PSD2) par maksājumu pakalpojumiem ES iekšējā tirgū. Jaunā direktīva nodrošina labākas iespējas integrēties ES maksājumu tirgū, paplašina tirgu ar jauna veida maksājumu pakalpojumiem un paver iespējas izmantot jaunas tehnoloģijas šo pakalpojumu sniegšanai.

Uz starptautisko attiecību un tiesību segmenta jomu attiecas divi raksti, un tie ir saistīti ar Ķīnas Tautas Republikas problemātiku. Tā *Dr. sc. pol.* ***Gunda Reire*** pievēršas Ķīnas balsošanas praksei ANO Drošības padomē un tās juridiskajai un politiskajai interpretācijai attiecībā pret Sīriju. Autore analizē Ķīnas globālo politiku, mainīgo balsošanas praksi Apvienoto Nāciju Organizācijas Drošības padomē un reakciju uz pilsoņu karu Sīrijā. Autore secina, ka tas viss ir saistīts ar Ķīnas iekšpolitikas prioritātēm un tās stratēģiskajiem centieniem pārveidot globālo pārvaldību. Savukārt Rīgas Stradiņa universitātes docētāji ***Mārtiņš Daugulis*** un *Dr. sc. pol.* ***Kārlis Bukovskis*** analizē kognitīvo diskursu un stāstījumus par Ķīnu, Centrāleiropu un Austrumeiropu, galvenokārt balstoties uz Ķīnas prezidenta Sji Dzjiņpina vēstījumiem.

Lietuvas tiesību speciālisti ***Audronė Balsiukienė*** un ***Remigijus Jokubauskas*** skata visnotaļ specifisku jomu – jaunās un pagaidu finansēšanas problēmas pārstrukturēšanas procedūrās. Autori mēģinājuši rast atbildi uz jautājumu, vai direktīvas par pārstrukturēšanu un maksātnespēju, palielinot pārstrukturēšanas procesu efektivitāti ar pagaidu un jauna finansējuma regulējumu, ir saderīgas ar pārstrukturēšanas procesu mērķiem.

Mg. iur. ***Diāna Bukēviča*** pievēršas faktisko īpašnieku definēšanas problēmām tādām juridiskām personām kā kapitālsabiedrības, asociācijas un nodibinājumi, kā arī jautājumam par to ārvalstu komersantu faktisko īpašnieku noteikšanu, kuri izmanto filiāles un pārstāvniecības.

Vairākos *Socrates* rakstos atbilstoši Rīgas Stradiņa universitātes profilam ir aplūkota medicīnas tiesību tematika. *Dr. iur.* ***Līgas Mazures*** rakstā, pamatojoties uz Pacientu tiesību likuma nosacījumiem, tiek analizēta pacientu pienākumu būtība. Autore atzīst, ka mūsdienās tiek pievērsta pastiprināta uzmanība pacienta pienākumiem ārstniecības

attiecībās, paplašinot pacientu pienākumu interpretāciju, tādējādi radot pamatu jauniem pacienta pienākumiem ārstniecībā. Atbilstoša pieeja ir pamatota, jo medicīnas tiesību kontekstā dominē pacientu tiesību aizsardzība. Jaunā tiesību zinātniece ***Laura Šāberte*** ir analizējusi problēmu, kas saistīta ar pacienta tiesībām saņemt pārrobežu veselības aprūpes pakalpojumus, ņemot vērā pacientu reliģiskajai pārliecībai atbilstošu ārstniecības metodi. Raksta autore ir veikusi Eiropas Savienības un nacionālo normatīvo aktu un zinātniskās literatūras izpēti, kas attiecas uz pacienta tiesībām saņemt pārrobežu veselības aprūpes pakalpojumus un ir saistīti ar tiesībām uz reliģijas brīvību.

Zināmā mērā līdzīgai tematikai ir veltīts jau cits ***Lauras Šābertes***, kā arī *Mg. iur.* ***Daces Tarasovas*** un *Ph.D.* ***Karinas Palkovas*** raksts par ārstniecības personu tiesībām paust savu reliģisko pārliecību darba tiesiskajās attiecībās. Neapšaubāmi, ārstniecības personu tiesības uz reliģijas brīvību ir vērtējamas kā daļa no cilvēktiesībām. Autores pilnīgi pamatoti secina, ka valstīm ir jābūt neitrālām, sniedzot iespēju katram indivīdam, tostarp arī ārstniecības personām, pieņemt vai nepieņemt reliģiju atbilstoši savai pārliecībai. Minētais jautājums ir izteikti komplicēts un skatīts ne tikai no cilvēktiesību aspekta, bet arī ņemot vērā darba tiesisko attiecību regulējošos tiesību aktus.

Saturiski ļoti saistošs ir jaunās tiesību zinātnieces un psihiatres ***Marinas Losevičas***, ārsta ***Oskara Bundžas*** un *Ph.D.* ***Ingas Kudeikinas*** raksts par piespiedu ārstēšanu kā valsts pārvaldes uzdevumu. Autori analizē tiesiskā regulējuma par piespiedu ārstēšanu infekcijas slimību un psihisku traucējumu gadījumā attīstību un kvalitāti Latvijā un pasaulē kopš 19. gadsimta. Rakstā aplūkoti divi interesanti gadījumi – par tifozo Mēriju (*Mary Mallon*) un nedziedināmi psihiski slimo Bavārijas monarhu Ludvigu II. Abas minētās personas bija apkārtējiem bīstamas savu veselības traucējumu dēļ un radīja smagas sekas sabiedrībai. Tas ļauj secināt, ka piespiedu psihiatriska ārstēšana ir valsts pārvaldes uzdevums iekšējās drošības un cilvēktiesību aizsardzības nodrošināšanas jomā.

Valsts Policijas koledžas docētājs ***Māris Vitkovskis*** analizē jaunas un inovatīvas jomas – bezpilota gaisa kuģu jeb dronu izmantošanas – tiesisko regulāciju. Mūsdienās krasi pieaug dronu izmantošana dažnedažādās jomās, tomēr, kā atzīmē autors, dronu izmantošanas tiesiskais regulējums atsevišķās jomās, piemēram, operatīvās darbības jomā, nav pietiekams.

Tiesību aizsardzības iestādēs viena no praktiski nozīmīgākajām problēmām ir ierosināto kriminālprocesu risināšana saprātīgos termiņos, vienlaikus nodrošinot soda neizbēgamību par veikto nodarījumu. Tiesību zinātņu doktora grāda pretendents ***Dainis Vēbers*** savā pētījumā skata paātrinātās procedūras un citu vienkāršotu kriminālprocesu formu efektīvas piemērošanas aspektus, lai nodrošinātu soda neizbēgamību, kā arī atvieglotu tiesības uz kriminālprocesa izmantošanu saprātīgā termiņā.

Tiesību zinātņu doktores ***Karina Zalcmane*** un ***Marina Kameņecka-Usova*** sniedz savu ieskatu par visai netradicionālu tēmu – atbildību sportā kā neatkarīgu juridiskās atbildības veidu. Sporta noteikumu pārkāpšanas gadījumos visbiežāk ir paredzēti

netradicionāli atbildības veidi un sankcijas (piemēram, diskvalifikācija, liegums piedalīties sporta spēlēs). Līdz ar to nav vispārpieņemta viedokļa par to, vai sporta atbildība ir jauns juridiskās atbildības veids vai ne.

L.L.M. ***Edijs Brants*** aplūko maz pētītu teorētiska rakstura problēmu – pārredzamības lomu civiltiesiskās atbildības aspektā. Autors analizē pārredzamības principu no dažādiem viedokļiem, piemēram, no vispārējās (uz vainu balstītās) atbildības, kā arī no stingrās atbildības viedokļa.

Socrates rakstu krājumā ir ietverti divi raksti, kas ir saistīti ar noziedzīgo nodarījumu atklāšanas problemātiku. Internacionālais autorkolektīvs – Latvijas Valsts policijas Ekonomisko noziegumu apkarošanas pārvaldes galvenā inspektore ***Jūlija Liodorova***, Lietuvas Kriminālistikas centra eksperts ***Marius Barkauskas*** un Latvijas Universitātes profesore ***Ruta Šneidere*** – analizē ekonomikas jomā visai specifisku noziegumu kopumu – aktīvu piesavināšanos. Autori pievērš uzmanību šo nodarījumu precīzai kvalifikācijai, kas ir saistīta ar piesavināšanās fakta identifikāciju un specifiskām izmeklēšanas darbībām, tostarp ekspertīzēm, lai nodrošinātu efektīvu aktīvas piesavināšanās atklāšanu. Ekonomisko noziegumu vidū aktīvu piesavināšanos skaits pieaug, līdz ar to raksta autoru piedāvātā metodika ir praktiski nozīmīga. No praktiskā viedokļa ne mazāk noderīga ir Igaunijas un Latvijas autoru publikācija par dažādu papillāro rakstu tipu sastopamības biežumu igauņu vīriešiem un sievietēm. *Dr. iur.* ***Silvija Kaugia*** (Igaunija), *Dr. iur.* ***Annika Lall*** (Igaunija) un *Mg. iur.* ***Aelita Zīle*** (Latvija) salīdzina pašreizējo pētījumu rezultātus ar agrāk veikto pētījumu rezultātiem, kas ir atspoguļoti literatūrā.

Specifiskai un līdz šim nepietiekami izzinātai tēmai – pazemes dzīļu juridiskā statusa definēšanai – ir pievērsies tiesību zinātņu doktora grāda pretendents ***Kārlis Piģēns*** un *Ph.D.* ***Ivars Kronis***. Latvijas Republikas Saeima 2021. gadā pieņēma grozījumus likumā "Par zemes dzīlēm", kas neapšaubāmi uzlabos tiesisko situāciju zemes dzīļu jautājumos. Tomēr autori atzīst, ka kopumā būtu jāveic konceptuālākas un radikālākas izmaiņas Latvijas tiesiskajā regulējumā attiecībā uz pazemes dzīlēm un to derīgajām īpašībām.

Rakstu krājums ir apjomīgs, ar daudzveidīgiem ieskatiem dažādās tiesību jomās un apakšnozarēs. Raksti atspoguļo vairāku valstu tiesiskā regulējuma īpatnības, institucionālās pieejas, kā arī praktisko pieredzi. Autoru viedokļi var sniegt ierosmi diskusijām un pārdomām.

Dr. iur. Andrejs Vilks,
RSU Juridiskās fakultātes profesors

Foreword

To some extent the anniversary edition (this being the twentieth) of the electronic legal journal *Socrates* has reached its readers. It must be acknowledged that it is developing and improving both qualitatively and quantitatively. The growing internationalisation of the articles included in *Socrates* is evident. The authors of the articles represent five countries, and through their analysis, diverse and interesting experiences in researching legal and socio-political issues have been covered. The collection of articles encompases a wide range of issues. The authors have tried to comprehensively and deeply identify the research questions, and this has significantly increased the volume of the journal.

Ph.D. ***Laura Ratniece*** analyses a methodologically important issue of interdisciplinarity in legal research. The author admits that interdisciplinary research in law is not yet widespread in Latvia; therefore, she has considered several basic issues, the main being what interdisciplinary research in law is.

The Chairman of the Constitutional Court *Dr. iur.* ***Sanita Osipova*** views a problem that has been little studied in jurisprudence, i.e., convicted persons as a stigmatised group in the case law of the Constitutional Court. The author emphasises that the Constitutional Court has declared norms that restrict certain rights of the punished persons to be inconsistent with the Satversme. The punished persons are stigmatised for life. Consequently, by unreasonably restricting participation of punished persons in the life of society, the society does not protect but rather endangers itself.

The last two years have been passed under the influence of Covid-19. From a legal point of view, the issue of pandemic control measures is important. One such radical measure is the imposition of a state of emergency. *Mg. iur.* ***Ieva Bērziņa*** (Latvia) and ***Coline Jeancourt-Galignani*** (France) have compared the experience of regulating state of emergency in Latvia, France and Belgium. The authors acknowledge that the institute of state of emergency and its legal regulation is an important part of every country's national legal system, as it is a mechanism that helps to strengthen national security in case of external and internal threats. Comparative analysis of the legal framework of the state of emergency in Latvia, France and Belgium creates preconditions for improvement of the national legal framework in the field.

Dr. iur. ***Marta Urbāne***, *Dr. oec.* ***Inna Dovladbekova*** and *Dr. oec.* ***Anželika Berķe-Berga*** have also studied the problem related to Covid-19 – legal aspects of teleworking. The situation of Covid-19, development of modern technologies and entry of new generations into the labour market are making teleworking an increasingly important form of employment. The authors have concluded that the planned changes in the Latvian

Labour Law regarding telework do not create legal certainty in employment relations in emergency situations, including the Covid-19 crisis.

A number of articles in this *Socrates* collection are devoted to issues of international law, relations or cooperation. The publication of *Ph.D.* ***Olena Agapova*** (Ukraine), for example, reveals the international cooperation in the field of justice between Ukraine and Latvia. The analysis of activities of the Ministries of Justice of both countries, based on the study of legal framework, institutional structure and management systems, has allowed to identify the main forms of international cooperation and draw important conclusions. International legal cooperation between Latvia and Ukraine is developing and improving.

Young Lithuanian law scientists ***Mykolas Kirkutis*** and ***Vigintas Višinskis*** draw attention to the problematic aspects of recognition and enforcement of foreign judgments, including the application of the public policy clause in the European Union. The authors of the article also study the content of the public policy clause. In the field of international law, doctoral candidate ***Anete Bože*** discusses Directive 2007/64/EC (i.e. the first Payment Services Directive PSD1) and Directive 2015/2366 (i.e. the second Payment Services Directive PSD2) on payment services in the EU internal market. The new directive provides better opportunities for integration into the EU payments market, expands the market with new types of payment services, and expands the possibilities to use new technologies for the provision of these services.

There are two articles in the field of international relations and law related to issues of the People's Republic of China. For instance, *Dr. sc. pol.* ***Gunda Reire*** focuses on China's voting practices in the UN Security Council and its legal and political interpretation in relation to Syria. The author analyses China's global policy, changing voting practices in the UN Security Council and the response to the civil war in Syria. Her study has led to a conclusion that all this is related to priorities of the domestic policy of China and its strategic efforts to transform global governance. However, RSU lecturers ***Mārtiņš Daugulis*** and *Dr. sc. pol.* ***Kārlis Bukovskis*** analyse narratives of cognitive discourse about China, Central and Eastern Europe, mainly based on the messages of the Chinese President Xi Jinping.

Lithuanian legal experts ***Audronė Balsiukienė*** and ***Remigijus Jokubauskas*** look at a very specific area – new and interim financing problems in restructuring procedures. The authors seek to answer the question of whether the Restructuring and Insolvency Directives, by increasing the efficiency of restructuring processes through interim and new funding arrangements, are compatible with the objectives of restructuring processes.

Mg. iur. ***Diāna Bukēviča*** addresses the problems of defining beneficial owners for such legal entities as capital companies, associations and foundations, as well as the issue of determining the beneficial owners of foreign merchants who use branches and representative offices.

A number of *Socrates* articles, matching the profile of Rīga Stradiņš University, are dedicated to the topic of medical law. In the article by *Dr. iur.* ***Līga Mazure***, based

on the provisions of the Law "On the Rights of Patients", the essence of patients' obligations has been analysed. The author acknowledges that nowadays increased attention is paid to patient's responsibilities in medical relationship, broadening the interpretation of patients' responsibilities, thus creating a basis for new patient responsibilities in medical treatment. The approach is justified because the protection of patients' rights is prevalent in the context of medical law. ***Laura Šāberte***, a young legal scientist, has analysed the problem related to the patients' right to receive cross-border healthcare services, taking into account the treatment method in accordance with the patients' religious beliefs. The author of the article has researched the European Union and national laws and regulations and the scientific literature related to the patients' right to receive cross-border healthcare and those related to the right to freedom of religion. To a certain extent, a similar issue has been covered within another article by ***Laura Šāberte*** as well as *Mg. iur.* ***Dace Tarasova*** and *Ph.D.* ***Karina Palkova*** on the right of medical practitioners to express their religious beliefs in employment relations. There is no doubt that the right of medical practitioners to freedom of religion must be seen as part of human rights. The authors rightly conclude that states must be neutral, allowing every individual, including medical practitioners, to accept or not to accept a religion according to their beliefs. This issue is extremely complex and is viewed not only from the point of view of human rights, but also from the perspective of labour law. In terms of content, a very interesting article has been written by the new legal scientist and psychiatrist ***Marina Loseviča***, doctor ***Oskars Bundža*** and *Ph.D.* ***Inga Kudeikina*** on involuntary treatment as a task of public administration. The authors analyse the development and quality of the legal framework in Latvia and in the world since the 19th century on involuntary treatment in cases of infectious diseases and mental disorders. The article provides two interesting examples – about the typhus *Mary Mallon* and the terminally ill Bavarian monarch Ludwig II. Both of these persons were dangerous to others due to their health problems and had serious consequences for society. This leads to the conclusion that involuntary psychiatric treatment is a task of public administration in the field of ensuring internal security and protection of human rights.

Māris Vitkovskis, a lecturer at the State Police College, analyses the legal regulation of a new and innovative field – the use of unmanned aerial vehicles or drones. Nowadays, the use of drones in various fields is growing rapidly; however, as the author notes, the legal regulation of the use of drones in certain areas, such as operational activities, is insufficient.

In law enforcement institutions, one of the most significant problems in practice is resolving the initiated criminal proceedings within a reasonable time, while ensuring the inevitability of punishment for the committed crime. In his research, ***Dainis Vēbers***, a doctoral candidate in law, considers aspects of effective application of accelerated procedures and other simplified forms of criminal proceedings in order to ensure the inevitability of punishment, as well as to facilitate the right to use criminal proceedings within a reasonable time.

Doctor of Laws *Ph.D.* ***Karina Zalcmane*** and *Ph.D.* ***Marina Kameņecka-Usova*** give their insight into a rather unconventional topic – responsibility in sport as an independent form of legal responsibility. In cases of violation of sports rules, non-traditional forms of liability and sanctions (disqualification, prohibition to participate in sports games, etc.) are most often provided. Consequently, there is no generally accepted view as to whether or not sports liability is a new form of legal liability.

L.L.M. ***Edijs Brants*** looks at a little-studied theoretical problem – the role of transparency in civil liability. The author analyses the principle of transparency from different points of view, for example, from the perspective of general (fault-based) liability, as well as from the point of view of strict liability.

The collection of articles *Socrates* contains two articles related to the issue of crime detection. The international team of authors – ***Jūlija Liodorova***, Chief Inspector of the Latvian State Police Department for Combating Economic Crimes, ***Marius Barkauskas***, expert of the Lithuanian Forensic Science Centre and ***Ruta Šneidere***, Professor at the University of Latvia – analyse a very specific set of crimes in the field of economics – active embezzlement. The authors pay attention to the precise qualification of these offenses, which is related to identification of the fact of embezzlement and specific investigative activities, including examinations, in order to ensure effective detection of active misappropriation. Among economic crimes, the number of active embezzlement cases is increasing, thus the methodology proposed by the authors of the article is practically significant. No less meaningful is the publication by Estonian and Latvian authors on the incidence of different types of papillary patterns in Estonian men and women. *Dr. iur.* ***Silvija Kaugia*** (Estonia), *Dr. iur.* ***Annika Lall*** (Estonia) and *Mg. iur.* ***Aelita Zīle*** (Latvia) compare the results of current research with the results of previous research, reflected in the literature

A specific and hitherto insufficiently researched topic – definition of the legal status of subterranean depths – has been addressed by a candidate for the degree of Doctor of Laws ***Kārlis Piģēns*** and *Ph.D.* ***Ivars Kronis***. In 2021, the Saeima of the Republic of Latvia adopted amendments to the Law "On Subterranean Depth", which will undoubtedly improve the legal situation in matters of subterranean depths. However, the authors acknowledge that, in general, more conceptual and radical changes should be made in the Latvian legal framework regarding subterranean depths and their useful properties.

The collection of articles is extensive, with diverse insights into different areas and sub-sectors of law. The articles reflect peculiarities of the legal framework of several countries, institutional approaches, as well as practical experiences. The views of the authors can stimulate discussion and reflection.

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Pētījumi tiesību zinātnē un starpdisciplinaritāte: īss ieskats pamatjautājumos

Legal Research and Interdisciplinarity: Overview of Key Issues

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Abstract

Even though interdisciplinarity in legal research is not a novelty anymore, it is not yet that widespread in Latvia. In order to initiate a discussion about using interdisciplinarity in legal research, the author suggests that it is necessary to start by looking at key issues related to interdisciplinarity in law; the main issue being what is interdisciplinary legal research.

Keywords: interdisciplinarity, legal research.

Ievads

Starpdisciplinaritāte tiesību zinātnē vairs nav jaunums. Starpdisciplināri virzieni, piemēram, tiesības un ekonomika, tiesības un valoda, tiesības un politika, jau ir nostiprinājuši savas pozīcijas. Joprojām turpina parādīties arvien jaunas nozaru kombinācijas. Viena no šobrīd aktuālākajām – tiesības un tehnoloģijas (lai gan jāpiebilst, ka šis virziens varētu būt multidisciplinārs, nevis starpdisciplinārs).

Starpdisciplināri pētījumi tiesību zinātnē nenoliedzami kļūst aizvien populārāki un pieprasītāki. Bieži konkursos uz doktorantūras studiju vietām tiek prasīts, lai pretendenta pieteiktais pētījuma temats tiktu pētīts starpdisciplināri (skatīt, piemēram, International Max Planck Research School for Successful Dispute Resolution in International Law Call for Applications, 2021). Pētniekam arvien biežāk jāvar apskatīt izzināmo jautājumu ārpus savas disciplīnas robežām – šis nosacījums palielina iespējas iegūt finansējumu pētījumam

(*Vick*, 2004). Var pat apgalvot, ka pastāv diezgan sīva konkurence starp tradicionālo doktrinālo pieeju pētījumiem tiesību zinātnē un starpdisciplināro pieeju (Gestel, Micklitz, 2014). Turklāt, piemēram, Amerikas Savienotajās Valstīs, virsroku gūst tieši starpdisciplinārā pieeja (Bix, 2012). Arī Latvijā jau ir veikti un publicēti vairāki pētījumi ar starpdisciplinārām vai multidisciplinārām iezīmēm (skatīt, piemēram, Treļs, 2016; Vilks, 2015), tomēr starpdisciplinārā pieeja pētījumos tiesību zinātnē Latvijā vēl nav ļoti populāra. Ievērojot šo tendenci un pieaugošo nepieciešamību arvien vairāk izmantot starpdisciplinaritāti pētījumos tiesību zinātnē, Latvijā nepieciešams aktualizēt šo jautājumu.

Šā raksta mērķis ir noskaidrot, kas ir starpdisciplinārs pētījums tiesību zinātnē, kādas ir "tiesības un..." iespējamās kombinācijas, vai tiesību zinātniekam vispār ir iespējams izmantot citas zinātņu nozares. Ieskats šajos jautājumos varētu veicināt izpratni par starpdisciplināriem pētījumiem un, iespējams, rosinātu tiesību zinātniekus biežāk izvēlēties šo pieeju savos pētījumos.

Lai sasniegtu raksta mērķi, tiek analizētas zinātniskās publikācijas par starpdisciplinaritāti, kā arī skatīti Latvijas Republikā spēkā esošie normatīvie tiesību akti, kas attiecas uz augstāko izglītību un zinātnisko darbību.

Rakstam ir trīs daļas. Pirmajā daļā aplūkots starpdisciplinaritātes jēdziens, īpašu uzmanību pievēršot tā nošķiršanai no multidisciplinaritātes. Otrajā daļā analizētas zinātņu nozares un apakšnozares, ar kurām varētu kombinēt tiesību zinātni. Savukārt trešajā daļā atspoguļots starpdisciplināru pētījumu tiesiskais regulējums Latvijas Republikā. Publikācijas noslēgumā ir būtiskākie secinājumi.

Kas ir starpdisciplinārs pētījums tiesību zinātnē?

Pirms noskaidrot jēdziena "starpdisciplinārs pētījums" nozīmi, nepieciešams apskatīt citu būtisku terminoloģijas jautājumu. Kāda ir atšķirība starp jēdzienu "starpdisciplinārs" (angļu valodā *interdisciplinary*) un "multidisciplinārs" (angļu valodā *multidisciplinary*)? Dažkārt šie jēdzieni tiek lietoti, nenošķirot to atšķirīgo nozīmi. Tādējādi multidisciplināri pētījumi var nepamatoti tikt saukti par starpdisciplināriem un otrādi. Arī juridiskajā literatūrā ir norādīts, ka praksē multidisciplinārs tiek saukts arī par starpdisciplināru, un tiek piedāvāts arī trešais jēdziens, kas angļu valodā ir *cross-disciplinary* – latviski to varētu tulkot kā "pārdisciplinārs" (Zhang, Gao, 2017). Vēl jānorāda, ka sastopams arī jēdziens, kuru varētu latviskot kā "transdisciplinārs", proti, angļu val. *transdisciplinary* (Craiovan, 2019). Tāpēc būtiski ir noskaidrot, vai pastāv atšķirība starp jēdzienu "starpdisciplinārs" un "multidisciplinārs". Ja atšķirība pastāv, tad jānoskaidro, kāda tā ir. Savukārt jēdzienu *cross-disciplinary* un *transdisciplinary* detalizēts skaidrojums varētu būt cita pētījuma temats.

Pirmajā brīdī varētu šķist, ka galvenā atšķirība starp jēdzienu "starpdisciplinārs" un "multidisciplinārs" ir tā, ka "starpdisciplinārs" ietver divas disciplīnas, bet "multidisciplinārs" – vairāk nekā divas. Tā tomēr nav.

Jēdzienam "multidisciplinaritāte" ir dažādi skaidrojumi. Tā, piemēram, tas tiek raksturots kā "pieeja, kurai nav pārāk striktas metodoloģijas" (Szmodis, 2012), un kā "pamata līmeņa sadarbība starp disciplīnām". Savukārt "starpdisciplinaritāte" vispārīgi, nevis konkrēti tiesību zinātnē, tiek skaidrota kā "zināšanu kombinācija no vairākām dažādām specialitātēm" (Brewer, 1999). Tātad atšķirība starp šiem jēdzieniem meklējama galvenokārt metodoloģijā, nevis iesaistīto zinātņu nozaru skaitā.

Detalizētu jēdzienu salīdzinājumu ir sniegušas Kristīne Medne un profesore Tatjana Muravska, norādot, ka multidisciplināra pieeja nozīmē "dažādu disciplīnu zināšanu / metožu izmantošanu un nereti arī pretstatīšanu, lai apskatītu kādu jautājumu / tēmu no dažādu disciplīnu perspektīvām" (Medne, Muravska, 2012). Savukārt "starpdisciplināras pieejas pamatā ir disciplīnu teoriju un metodoloģiju apvienošana, arī integrācija, un tai raksturīga disciplīnu robežu pārskatīšana un to pārkāpšana" (Medne, Muravska, 2012).

Starp šiem jēdzieniem tiešām pastāv būtiska atšķirība. Lai to ilustrētu un apskatītu tiesību izglītības un zinātnes kontekstā, kā piemēru var minēt starptautiskās preču tirdzniecības tiesības. Tās var studēt, izmantojot gan multidisciplināru, gan arī starpdisciplināru pieeju, proti, izmantojot multidisciplināru pieeju, papildus starptautiskās preču tirdzniecības tiesiskajam regulējumam varētu apgūt arī tirdzniecības ekonomiskos pamatus. Tātad konkrēts temats tiktu apskatīts no dažādu disciplīnu perspektīvas. Savukārt, izmantojot starpdisciplināru pieeju, varētu, piemēram, vērtēt tiesiskā regulējuma efektivitāti vai ietekmi uz izmaksām, kas saistītas ar darījumiem. Šo piemēru labi ilustrē raksts *Comparative Efficiency in International Sales Law* (DiMatteo, Ostas, 2011), kurā tiek analizēta ANO Konvencijas par starptautiskajiem preču pirkuma–pārdevuma līgumiem atsevišķu normu efektivitāte.

Jēdzienam "starpdisciplinārs pētījums tiesību zinātnē" nav vienotas definīcijas. Tiesību zinātniekiem arī šā jēdziena izpratne ir dažāda. Turklāt šā jēdziena vienotu izpratni apgrūtina arī tas, ka tiesību zinātnieki, rakstot par starpdisciplinaritāti vai to piemērojot, bieži vien to nemaz nedefinē. Tādēļ pētnieciskā darba lasītājam ir rūpīgi jāstudē attiecīgajā pētījumā izmantotā metodoloģija, lai izprastu, kā tieši konkrētajā darbā ir piemērota starpdisciplinaritāte un kā to ir izpratuši pētījuma autori.

Lai identificētu jēdziena "starpdisciplinārs pētījums tiesību zinātnē" vienojošos elementus, tika skatītas vairākas publikācijas, kurās šis jēdziens ir definēts vai skaidrots. Vendija Šrama (*Wendy Schrama*), piemēram, starpdisciplināru pētījumu tiesību zinātnē raksturo kā tādu, kurā "inkorporēti elementi no nejuridiskām disciplīnām" (Schrama, 2011). Savukārt Deivs Ouens (*Dave Owen*) un Karolīne Nobleta (*Caroline Noblet*) ir norādījuši, ka starpdisciplinārā pētījumā tiesību zinātnē ir būtiski pielietot zināšanas un metodoloģiju no citām akadēmiskām disciplīnām, nevis tikai izmantot primāros un sekundāros tiesību avotus (Oven, Noblet, 2014). Matiass Sīms (*Mathias M. Siems*) starpdisciplinārос pētījumus tiesību zinātnē, kuru pamatā ir juridisks pētnieciskais jautājums, iedala divās kategorijās – pamata un augstāka līmeņa starpdisciplināros pētījumos –, kuru pamatā ir izvēlētā metodoloģija. Pētījumi, kuros disciplīnas tiek nošķirtas, ir iekļauti pamata starpdisciplinaritātes kategorijā (manuprāt, tie atbilst

iepriekš aprakstītajam multidisciplināru pētījumu skaidrojumam). Savukārt augstāka līmeņa starpdisciplinārie pētījumi ir tie, kuri "integrē zinātniskās metodes juridiskajā domāšanā" (Siems, 2009).

Ievērojot iepriekš minēto skaidrojumu kopīgās iezīmes, starpdisciplināru pētījumu tiesību zinātnē varētu raksturot kā pētījumu, kura pamatā ir juridisks pētnieciskais jautājums un kurā ir inkorporēti elementi, piemēram, teorijas vai metodes, no kādas citas zinātņu nozares vai apakšnozares. Būtiski ir uzsvērt, ka dominējošai pētījuma daļai jābūt piederīgai tiesību zinātnei, proti, pētījuma ietvaros galvenokārt jāveic juridiskā analīze un jāpiemēro juridiskās pētniecības metodes. Savukārt starpdisciplinaritātei ir sekundāra vai papildinoša loma. Ja izrādās, ka kāda cita disciplīna, nevis tiesību zinātne, dominē, tad, visticamāk, tas vairs nav pētījums tiesību zinātnē.

Starpdisciplināra pieeja "tiesības un …"

Pētot šo tematu, vēl jānoskaidro, kādas ir starpdisciplināro pētījumu tiesību zinātnē iespējas. Kādas citas nozares varētu iesaistīt, veicot juridiskus pētījumus? Šeit jau tika minētas dažas no iespējām, piemēram, tiesības un ekonomika, taču tās nebūt nav vienīgās. Lai gūtu pilnīgāku priekšstatu par starpdisciplinaritātes iespējām, nepieciešams izprast zinātņu nozaru klasifikāciju un tiesību zinātnes vietu tajā.

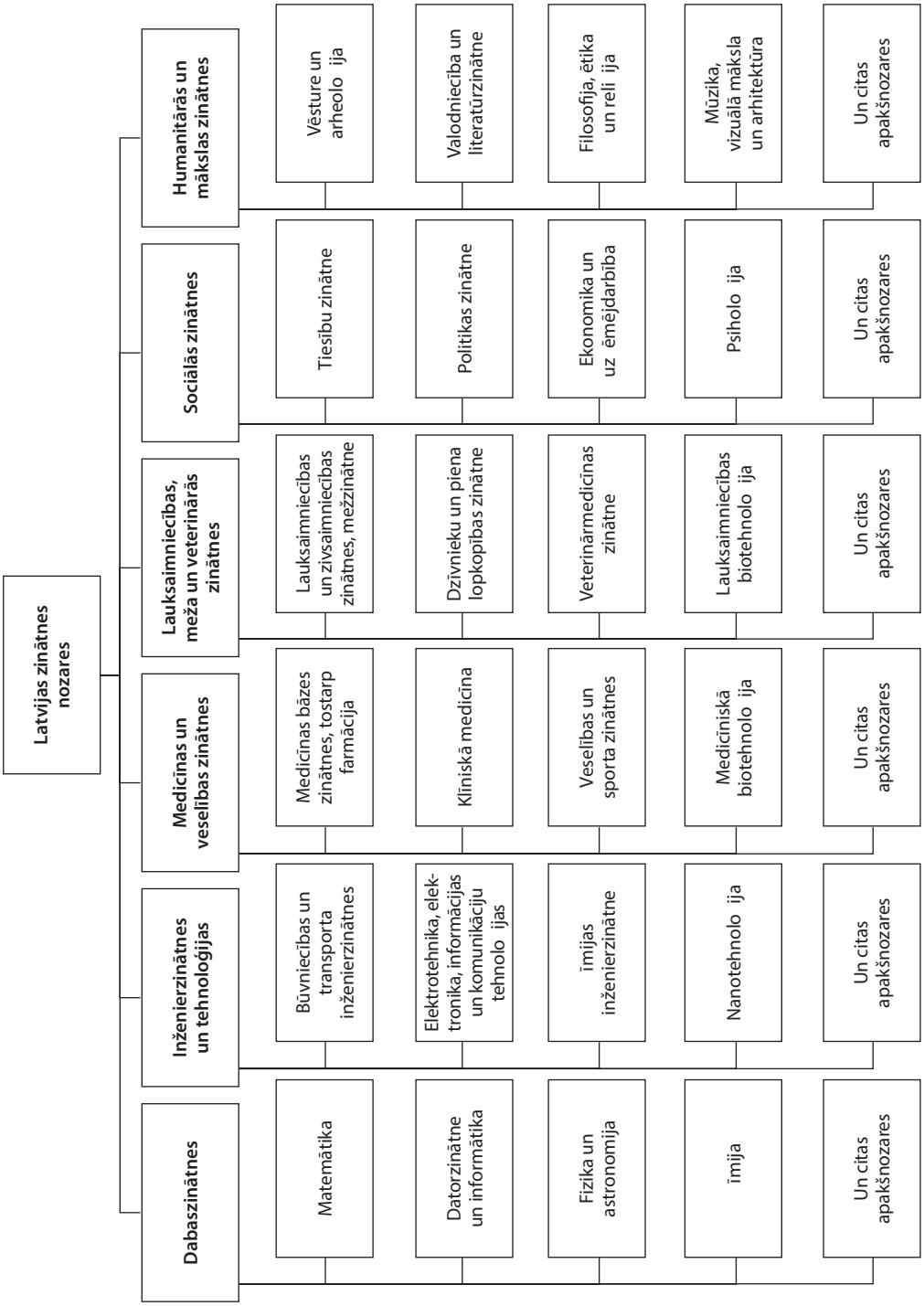
Saskaņā ar Latvijas zinātnes nozaru un apakšnozaru klasifikāciju tiesību zinātne ir sociālo zinātņu apakšnozare. Citas sociālo zinātņu apakšnozares ir, piemēram, politikas zinātne un ekonomika – sk. 1. att. (Noteikumi par Latvijas zinātnes nozarēm un apakšnozarēm, 2018).

Šī klasifikācija ir veidota, balstoties uz OECD sagatavoto Fraskati rokasgrāmatu *Frascati Manual* (Latvijas Republikas Izglītības un zinātnes ministrija, 2020), saskaņā ar kuru zinātņu nozaru un apakšnozaru klasifikācija ir veidota, izmantojot vairākus, arī šos, elementus:

- zināšanu avots;
- pētniecības objekts;
- metodes;
- piemērošanas joma (Frascati Manual, 2015).

Ievērojot to, ka starp zinātņu nozares apakšnozarēm pastāv zināma līdzība, var secināt, ka vajadzētu būt iespējamam veikt starpdisciplinārus pētījumus vienas zinātņu nozares ietvaros. To arī apliecina jau pastāvošie starpdisciplināro pētījumu tiesību zinātnē virzieni (piemēram, tiesību un ekonomikas, tiesību un politikas).

Pieņemot, ka starpdisciplinārus pētījumus tiesību zinātnē var veikt sociālo zinātņu ietvaros, nākamais solis būtu apsvērt, vai var kombinēt tiesību zinātni ar kādas citas zinātņu nozares (kas nav starp sociālajām zinātnēm) apakšnozari un cik "savienojamas" būtu dažādas zinātņu nozares un apakšnozares. Jau pašreiz pastāv vairāki atzīti starpdisciplināri virzieni, piemēram, tiesību un valodas un tiesību un literatūras, tāpēc var secināt, ka tiesību zinātni ir iespējams kombinēt arī ar humanitāro un mākslas zinātņu apakšnozarēm.



1. attēls. Latvijas zinātnes nozaru klasifikācija

To apliecina arī citi starpdisciplinārie – tiesību un vēstures un tiesību un filosofijas – virzieni, ievērojot, ka vēsture un filozofija arī ir humanitārās zinātnes.

Grūtāk būtu savienot tiesību zinātni ar kādu no, piemēram, dabaszinātņu vai lauksaimniecības zinātņu apakšnozarēm. Šobrīd droši vien ir grūti iztēloties tiesību un ķīmijas starpdisciplināro virzienu, taču nevar noliegt, ka nākotnē arī tāds varētu tikt attīstīts. Tajā pašā laikā jānorāda, ka šādā nozaru kombinācijā, iespējams, multidisciplināra pieeja varētu būt reālāka.

Tiesību zinātniekam, domājot par iespējamo starpdisciplinaritāti savā pētījumā, vajadzētu apsvērt, vai izvēlētais starpdisciplinārais virziens ir vienlīdz piemērojams visām tiesību zinātnes apakšnozarēm. Balstoties uz saviem personīgajiem novērojumiem, domāju, ka tiesību un ekonomikas starpdisciplinārais virziens ļoti labi var saderēt ar privātajām tiesībām, jo īpaši ar līgumtiesībām, taču tikpat veiksmīgi šis virziens piemērojams publisko tiesību pētījumiem. Savukārt tiesību un politikas starpdisciplinārais virziens piemērotāks būtu valsts tiesību pētījumiem.

Domājot par iespējamām tiesību un... kombinācijām, jāņem vērā, ka katrai zinātņu nozarei ir sava pieeja akadēmiskiem pētījumiem un metodoloģijām un tiesību zinātnieku uzdotie pētnieciskie jautājumi atšķiras no citu sociālo zinātņu pētnieciskajiem jautājumiem (Cryer, Hervey, Sokhi-Bulley, Bohm, 2011). Vienmēr pirms starpdisciplināra pētījuma uzsākšanas kādā tiesību un... virzienā ir nepieciešams rūpīgi iepazīties ar otrā nozarē pielietoto metodoloģiju. Noderīgi būtu apsvērt frāzes "tiesības un..." nozīmi. Džeks Balkins (*Jack M. Balkin*) ir norādījis, ka šī ir paradoksāla frāze, kurā uzsvērts tas, ka tiesību zinātne vienlaikus ir gan atvērta citām zinātnēm, gan arī turpina sevi nošķirt no tām (Balkin, 1995).

Līdz ar to tiesību zinātniekam, uzsākot starpdisciplināru pētījumu, jāveic metodoloģiski apsvērumi attiecībā uz to, cik daudz konkrētais pētījums būs "atvērts" citai disciplīnai.

Vai tiesību zinātniekam ir iespējams piemērot citas zinātņu nozares?

Zinātniekam, kurš potenciāli vēlētos veikt starpdisciplināru pētījumu, varētu rasties šaubas, vai šāds pētījums tiks atzīts un pieņemts un vai tas negatīvi neietekmēs viņa autoritāti. Šaubu pamatā varētu būt apstāklis, ka lielākoties zinātniekiem ir izglītība un specializācija vienā konkrētā zinātņu nozarē (šā raksta kontekstā – tiesību zinātnē). Līdz ar to, piemēram, pētījumi tiesību zinātnē, kurus veicis tiesību zinātnieks un kuros integrēti elementi no citām zinātņu nozarēm, varētu radīt šaubas par pētījuma kvalitāti un uzticamību, jo kā gan persona bez izglītības attiecīgajā zinātņu nozarē var piemērot šīs nozares elementus, piemēram, metodes, teorijas. Šāds arguments bieži tiek izmantots, lai kritizētu starpdisciplinārus pētījumus tiesību zinātnē (Nkansah, Chimbwanda, 2016).

Lai kliedētu šāda veida šaubas, pirmkārt, nepieciešams noskaidrot, kāds ir starpdisciplināru pētījumu tiesiskais pamats (šā raksta ietvaros – Latvijas Republikā). Otrkārt, nepieciešams identificēt iespējamos argumentus, kas atspēkotu pret starpdisciplināriem pētījumiem vērstus apgalvojumus.

Latvijas Republikā starpdisciplināru pētījumu veikšana netiek tieši regulēta, tomēr, izpētot attiecīgos normatīvos aktus, var secināt, ka šāda pieeja ir pieļaujama un ka starpdisciplinārus pētījumus var veikt ikviena persona. Zinātniskās darbības likuma 8. panta pirmās daļas 1. punktā paredzēts: "Zinātniekam ir tiesības brīvi izvēlēties zinātnisko pētījumu virzienu un metodes" (Zinātniskās darbības likums, 2005). Tas izriet arī no Augstskolu likuma 6. panta pirmajā daļā nostiprinātā akadēmiskās brīvības principa un 6. panta trešās daļas, kas akadēmiskajam personālam ļauj izvēlēties pētījumu tematus un virzienu (Augstskolu likums, 1995). Tātad pirmais arguments par labu starpdisciplināru pētījumu veikšanai ir akadēmiskās brīvības princips.

Vēl vienu argumentu par labu starpdisciplināriem pētījumiem var atrast Ministru kabineta 2017. gada 13. jūnija noteikumos Nr. 322 "Noteikumi par Latvijas izglītības klasifikāciju" (Noteikumi par Latvijas izglītības klasifikāciju, 2017). Saskaņā ar šo noteikumu pielikumā pievienoto tabulu Nr. 2 "Latvijas kvalifikāciju ietvarstruktūras (LKI) līmenim atbilstošo zināšanu, prasmju un kompetenču apraksti" maģistra līmeņa studentiem jāspēj parādīt zināšanas, kuras "nodrošina pamatu radošai domāšanai vai pētniecībai, tajā skaitā darbojoties dažādu jomu saskarē". Savukārt doktorantūras līmenī students pārvalda "pētniecības metodoloģiju un mūsdienu pētniecības metodes attiecīgajā zinātnes nozarē vai profesionālajā jomā un dažādu jomu saskarē". Tādējādi var secināt, ka, iegūstot maģistra grādu, personai ir jāspēj vismaz apzināties starpdisciplinaritāti vai multidisciplinaritāti (varbūt to vēl pilnā apmērā nepielietojot). Savukārt, iegūstot doktora grādu, starpdisciplinaritāte vai multidisciplinaritāte jāpārvalda jau metodoloģijas līmenī. Tādējādi topošajam tiesību zinātniekam jau studiju laikā ir jārēķinās ar to, ka jāspēj darboties ārpus savas nozares robežām, t. i., "dažādu jomu saskarē".

Attiecībā uz iespējamo kritiku par pētījuma kvalitāti un uzticamību jānorāda, ka Zinātniskās darbības likuma 7. panta pirmajā daļā ir nostiprināts zinātnieka atbildības princips, proti, "zinātnieks atbild par savu zinātnisko pētījumu rezultātu objektivitāti un par saviem secinājumiem, kas izdarīti, pamatojoties uz šiem rezultātiem". Tātad vienīgais kritērijs tam, vai zinātnieks var veikt starpdisciplinārus pētījumus, varētu būt zinātnieka paša subjektīvais vērtējums, vai viņam ir pietiekamas zināšanas citā zinātņu nozarē vai apakšnozarē, lai tās elementus piemērotu savam pētījumam tiesību zinātnē. Roberts Krāmers (*Robert Kramer*) ir norādījis, ka, visticamāk, ir vajadzīgs pētnieks ar labām zināšanām vairākās disciplīnās, lai veiktu starpdisciplināru pētījumu, taču tas nenozīmē, ka būtu vajadzīgs akadēmisks grāds katrā disciplīnā (Kramer, 1959). Arī Matiass Bodigs (*Matyas Bodig*) ir paudis līdzīgu viedokli (Bodig, 2015). Tātad tiesību zinātniekam ir iespējams, piemēram, pašmācības ceļā apgūt nepieciešamās zināšanas kādā citā zinātņu nozarē vai apakšnozarē, lai tās varētu izmantot, veicot starpdisciplināru pētījumu tiesību zinātnē.

Pastāv viedoklis, ka tiesību zinātnieki, izvēloties lietot tradicionālo, t. i., doktrinālo pieeju, tomēr izmanto elementus arī no citām disciplīnām. Piemēram, "pētot un interpretējot juridiskos materiālus, pētniekiem jāpaļaujas uz vēsturi un lingvistiku" (Taekema, van der Burg, 2015). Tā kā interpretācija ir juridisko pētījumu neatņemama sastāvdaļa,

var secināt, ka katrs tiesību zinātnieks kaut nedaudz savos pētījumos jau iekļauj starpdisciplināru aspektu. Piemērojot, piemēram, gramatisko interpretācijas metodi, tiek pielāgoti tiesību un valodas starpdisciplinārā virziena elementi. Varbūt šis apstāklis var kalpot kā iedrošinājums tiesību zinātniekiem izpētīt tiesību un valodas starpdisciplināro virzienu un to lietot daudz plašāk.

Vēl jānorāda, ka bieži vien zinātniskajā darbā formulētajam pētāmajam jautājumam nepieciešama starpdisciplināra pieeja, lai to vispusīgi izzinātu. Tātad to ne tikai var lietot, bet pat nepieciešams piemērot. Tā, piemēram, ja tiktu lietota tiesību un ekonomikas starpdisciplinārā pieeja, vispusīgāki, saturiski dziļāki būtu tie pētnieciskie darbi (atbilstīgi novērotajam šādu darbu ir daudz, it īpaši studentu izstrādāto), kuru mērķis ir salīdzināt tiesiskos regulējumus dažādās valstīs attiecībā uz kādu konkrētu juridisku jautājumu, lai noteiktu, kurš regulējums ir efektīvāks, piemēram, palielina darījumu efektivitāti, – jēdziens "efektivitāte" tiesību un ekonomikas kontekstā (angļu valodā – *efficiency*, nevis *effectiveness*) ekonomikā tiek plaši lietots un ir daudz pētīts. Tas nozīmē, ka tiesību normu efektivitātes analīze un salīdzināšana jāsāk ar efektivitātes definēšanu. Lai to izdarītu, bez ekonomikas teorijas būs grūti iztikt. Līdz ar to, formulējot šāda veida pētnieciskos jautājumus, pētniekam jāvar darboties ārpus savas disciplīnas – tiesību zinātnes – robežām.

Secinājumi

1. Starpdisciplināram pētījumam tiesību zinātnē nav vienotas definīcijas, taču tam raksturīgas šādas pazīmes: tas ir pamatā juridisks pētījums, kurā inkorporēti elementi, piemēram, teorijas un metodes, no citām zinātņu nozarēm vai apakšnozarēm. Turklāt ir būtiski, ka dominējošai pētījuma daļai jābūt piederīgai tiesību zinātnei, proti, pētījumā galvenokārt jāveic juridiskā analīze un jāpiemēro juridiskās pētniecības metodes. Savukārt starpdisciplinaritātei ir sekundāra vai papildinoša loma. Ja izrādās, ka kāda cita disciplīna, nevis tiesību zinātne, dominē, tad tas, visticamāk, vairs nav pētījums tiesību zinātnē.
2. Lai veiktu starpdisciplināru pētījumu, tiesību zinātni kā sociālo zinātņu apakšnozari var kombinēt ar citām sociālo zinātņu, kā arī humanitāro un mākslas zinātņu apakšnozarēm. Tiesību zinātnes kombinēšana ar citām zinātņu nozarēm, piemēram, ar dabaszinātnēm, drīzāk būtu multidisciplinārs, nevis starpdisciplinārs pētījums.
3. Latvijas Republikā zinātniekiem nav tiesisku ierobežojumu starpdisciplināru pētījumu veikšanai. Vienīgais kritērijs tam, vai zinātnieks var veikt starpdisciplinārus pētījumus, ir zinātnieka paša subjektīvais vērtējums, vai viņam ir pietiekamas zināšanas citā zinātņu nozarē vai apakšnozarē, lai tās elementus piemērotu savam pētījumam tiesību zinātnē.

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Sodītas personas kā valsts stigmatizēta grupa Satversmes tiesas judikatūrā

Convicted Persons as State Stigmatized Group in the Case Law of the Constitutional Court of Latvia

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Abstract

The research aims to analyse the case law of the Constitutional Court in respect to restrictions on the fundamental rights of convicted individuals in correlation with society's views of convicts. To do so, along with the methods of legal science, i.e., analysis of legal provisions and case law, the research uses sociological concepts, methods, and sources. The fundamental rights of an individual require that the State protects every individual's human dignity in equal measure. However, even modern-day society still stigmatises particular groups of individuals, restricting their rights without good reason. The case law of the Constitutional Court of Latvia marks convicted individuals as a stigmatised group with limited rights. In the cases analysed in the research, not even the minimum standards of fundamental rights protecting personal privacy were applied to persons serving a sentence for serious offences, with no individual assessment provided for, because society's opinion, among other things, denies prisoners such fundamental rights. Furthermore, a part of the convicted individuals suffers a life-long stigma as they keep being restricted in their rights – e.g., rights to employment or to family life – even after the conviction has been expunged. The State has to realise if it limits possibilities for convicted individuals to lead a legitimate life enjoying full rights, probability of repeated offences by such individuals will be higher. By unreasonably restricting inclusion of convicted individuals in its life, society endangers rather than protects itself.

Keywords: human dignity, equality, stereotypes, stigma, convicted individual.

Ievads

Satversmes tiesas judikatūra ir kā spogulis, kurā atainojas Latvijas valsts un sabiedrība. Arī pēdējo gadu judikatūra iezīmē tendences, kas ļauj vērtēt Latviju kā demokrātisku un tiesisku valsti. Lai gan izskatīto lietu klāstā bijušas arī ar valsts pārvaldi un varas dalīšanu saistītas lietas, tomēr lielākā daļa no apstrīdētajām normām skāra pamattiesību jautājumus.

Vērtējot Satversmes tiesā pēdējā laikā izskatīto lietu klāstu, atklājas kopsakarība – daudzās lietās ir tikušas vērtētas tieši tādas tiesību normas, kas skar personu grupas, kuras īpaši asi var izjust jebkuru tiesību aizskārumu. Tie ir bērni, seniori, personas ar īpašām vajadzībām, trūcīgās personas, maznodrošinātie, ieslodzītie, sodītas personas u. c. Tāpat tikušas vērtētas minoritāšu – gan nacionālo, gan seksuālo – tiesības. Satversmes tiesā izskatīto jautājumu loks ir plašs, taču šajā pētījumā uzmanība tika vērsta uz cilvēka cieņas nodrošināšanu, ievērojot vienlīdzības principu, un tika vērtēts, kā tiek ņemtas vērā sabiedrības vismazāk aizsargāto grupu tiesības.

Pētījums ir veikts starpdisciplināri, proti, līdz ar jurisprudences metodēm pielietojot analīzē socioloģijas konceptu par noteiktas sociālās grupas stigmatizēšanu, un līdz ar tiesību avotiem pētījumā ir izmantota latviešu folklora un sociālajos medijos paustie viedokļi, kas ilustrē noteiktas grupas – sodītu personu – stigmatizēšanu.

Cilvēka cieņas juridiskie kritēriji

Līdz ar tiesiskas valsts nostiprināšanu aug arī prasības, kas tiek izvirzītas valstij cilvēka cieņas aizsardzībai. Tāpēc jo vairāk Latvijā tiek nostiprināta demokrātija un tiesiskums, jo aktuālāka kļūst cilvēka cieņas aizsardzība. Prasība ievērot un aizsargāt cilvēka cieņu ir saistoša likumdevējam, pieņemot ikvienu jaunu tiesību normu. Cilvēka cieņas aizsardzība ir jāliek pamatā visai tiesību sistēmai, jo tā ir noteikts gan Latvijas Republikas Satversmē (turpmāk – Satversme), gan Eiropas Savienības tiesībās un Latvijai saistošās starptautiskās tiesībās. Tieši vērtējot apstrīdētās normas no cilvēka cieņas kā konstitucionālas vērtības, vispārējā tiesību principa un cilvēka pamattiesības izvirzītajām prasībām, Satversmes tiesa pēdējo gadu laikā ir risinājusi būtiskākos jautājumus, tostarp par garantētā iztikas minimuma apmēru[1] un homoseksuālu pāru tiesībām uz savas ģimenes juridisku, sociālu un ekonomisku aizsardzību.[2]

Eiropas kultūrtelpā cilvēka cieņas koncepts ir veidojies pēctecīgi, sākot no antīkajiem laikiem, līdz ar izpratni, ka ikviena persona ir vērtība pati par sevi un tai piemīt neatņemamas dabiskās tiesības. Šī izpratne, kas sakņojas kristīgajā ētikā un tikusi attīstīta daudzu paaudžu filosofu darbos, secīgi nonāk līdz atziņai, ka ikvienam cilvēkam ir neatņemamas tiesības uz dzīvību, brīvību, līdztiesību u. tml. Līdz ar orientāciju uz cilvēka cieņu uzmanības centrā tiek novietots konkrēts cilvēks kā indivīds sev līdzīgo kopienā, lai

[1] Satversmes tiesas 2020. gada 25. jūnija spriedums lietā Nr. 2019-24-03.

[2] Satversmes tiesas 2020. gada 12. novembra spriedums lietā Nr. 2020-33-01; Satversmes tiesas 2021. gada 8. aprīļa spriedums lietā Nr. 2020-34-03.

izvairītos gan no pārmērīga individuālisma, gan kolektīvisma strupceļiem.[3] Mūsdienās Eiropas tiesībpolitiskajā doktrīnā ir skaidri definēts, ka cilvēka cieņa ir ikvienam cilvēkam piemītoša, neatņemama, garīgi tikumiska beznosacījuma vērtība.[4] No tās izriet virkne cilvēka tiesību: visi cilvēki ir līdztiesīgi, un ikvienam piemīt tādas pamattiesības, kuras neviens nedrīkst atņemt.[5] Šo tiesību īstenošanu nedrīkst ietekmēt ne personas izcelšanās, ne dzimums, ne vecums, ne reliģiskā pārliecība, ne tautība, ne seksuālā orientācija, ne pilsonība, ne pasaules uzskats vai politiskie uzskati.[6]

Tādējādi cilvēka cieņa kā tiesību norma liek izvirzīt valstij divas pamatprasības: respektēt personas brīvību un garantēt līdztiesību, nepieļaujot diskrimināciju. Šajā pētījumā uzmanība tika vērsta uz līdztiesības aspektu, jo neviena persona savu brīvību nevar baudīt, ja tiek ierobežota līdztiesībā. Jirgens Hābermāss (*Jürgen Habermas*, 1929) ir secinājis: "Cilvēka cieņas jēdziens ir veicinājis kompromisu funkcijas, jo ir neitralizējis nepārvaramas atšķirības [sabiedrībā], specificējot un paplašinot cilvēka tiesības."[7] Tādējādi, īstenojot cilvēka cieņas aizsardzību, ir tikusi paplašināta gan cilvēka brīvība, ko garantē pamattiesības, gan arī līdztiesība, veidojot iekļaujošu sabiedrību, kurā tiek mazinātas sabiedrības grupu iekšējās pretrunas.

Sabiedrība visupirms pastāv kā tās locekļu savstarpējo attiecību, tostarp tiesisko attiecību, veidots tīkls,[8] kurā ikvienas personas brīvības un tiesības saskaras un mijiedarbojas ar citu personu brīvībām un tiesībām, veidojot blīvu savstarpējo tiesību, pienākumu un atbildības sistēmu. Tas nozīmē, ka jau pati sabiedrības locekļu attiecību būtība ierobežo ikvienas personas brīvību, jo tā īstenojama vienīgi saskarsmē ar citiem sabiedrības locekļiem. 20. gadsimta gaitā būtiski mainījās izpratne par valsti un sabiedrību, taču visupirms par to, kas ir pilntiesīgs pilsoniskās sabiedrības loceklis. Nemitīgi paplašinājās līdztiesīgo, proti, to cilvēku, kas bauda cilvēka cieņu, loks. Līdztiesību ieguva sievietes, etniskās minoritātes, dažādu reliģiju un ādas krāsas cilvēki, līdz pakāpeniski izveidojās mūsdienu multikulturālā pilsoniskā sabiedrība, kurā valda prasība pēc vienlīdzības, kā arī diskriminācijas aizlieguma princips.[9] Pastāvošās Rietumu sabiedrības paradokss –, no vienas puses, ir ievērojami audzis ikvienai personai noteikto brīvību skaits, un to saturs ir kļuvis aizvien plašāk īstenojams. No otras puses, šīs brīvības īstenošanas rezultātā izveidojas

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[3] Fogels, B. (2007). *Centrā: cilvēka cieņa. Kristīgi atbildīga politiska rīcība. Kristīgā ētika kā palīdzība orientācijai.* Rīga: Konrāda Adenauera fonds, 17–18.

[4] Creifelds, C. (1994). *Rechtswörterbuch.* München: C. H. Beck, 779.

[5] Fischer, J. (2006). *Menschenwürde und Staatsnotstand. In Menschenwürde in der säkularen Verfassungsordnung: rechtswissenschaftliche und theologische Perspektiven.* Hrsg. Petra Bahr, Hans Michael Heinig. Mohr Siebeck, 239–240.

[6] Levits, E. (2011). 91. panta komentārs. No: *Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības.* Zin. vad. R. Balodis. Rīga: Latvijas Vēstnesis, 78–79.

[7] Hābermāss, J. (2013). *Par Eiropas konstitūciju.* Rīga: Zinātne, 22.

[8] Luhmann, N. (1968). *Zweckbegriff und Systemrationalität.* Tübingen: J. C. B. Mohr, 125.

[9] Levits, E. (2011). 91. panta komentārs. No: *Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības.* Zin. vad. R. Balodis. Rīga: Latvijas Vēstnesis, 78–79.

sadrumstalota, multikulturāla sabiedrība, kurā cilvēkiem jāmācās ar iecietību izturēties pret tās locekļu atšķirīgo kultūru īpatnībām.[10] Jau 20. gadsimta sākumā, kad sāka iezīmēties minētās tendences, ASV Augstākās tiesas tiesnesis Olivers Vendels Holms (*Oliver Wendell Holmes Jr.*, 1841–1935) formulēja atziņu: "Katram cilvēkam ir tiesības darīt visu, ko viņš vēlas, ja vien viņš netraucē kaimiņiem baudīt līdzīgas tiesības."[11] Tā nu sanāk, ka jo vairāk brīvības baudām mēs paši, jo vairāk brīvības mums ir pienākums dot citiem. Tas nosaka jaunus pienākumus arī valstij, jo brīvu, līdztiesīgu personu veidotā multikulturālā sabiedrībā tiesību sistēmai ir jābūt elastīgai, lai garantētu ikvienas personas brīvību.[12] Ikvienas personas cilvēka cieņas īstenošana ir iespējama tikai iekļaujošā līdztiesīgo sabiedrībā, kurā tās ievērošanu sekmē valsts, izveidojot un uzturot atbilstošu tiesību un tiesu sistēmu.

Mūsdienu demokrātiskā tiesiskā valsts vairs nav vairākuma vara, kas diktē savus noteikumus mazākumam, bet gan multikulturālas sabiedrības politiskā organizācija, kas aizstāv ikvienas personas brīvību un līdztiesību. Jau 20. gadsimta otrajā pusē Rietumu tiesību doktrīnā nostiprinājās doma, ka tiesības ir sociālais kompromiss, ko tautas leģitimēti pārstāvji – parlamentārieši –, noformējot tiesību normu formā, padara vispārsaistošu,[13] bet likumdevēja rīcības brīvību ierobežo vispārējie tiesību principi un konstitūcija, kā arī starptautiskās saistības.[14]

Juridiski prasība pēc vienlīdzības ir skaidra un saistoša, tomēr Satversmes tiesā iesniegtie pieteikumi atklāj, ka ne visi ir vienlīdz līdztiesīgi un ne visi tiek laipni gaidīti iekļaujošā sabiedrībā, kas Latvijā tiek stiprināta, lai iedzīvinātu Satversmes prasībām atbilstošu demokrātisku tiesisku valsti, kurā tiek ievērota ikvienas personas cieņa. Ja būtu jāizvēlas zīmīgākais citāts no 2020. gadā pieņemtajiem Satversmes tiesas spriedumiem, kas raksturo visas judikatūras ievirzi, tas būtu:

> "Ar cilvēka cieņas principu nav savienojams uzskats, ka viena cilvēka cieņai varētu būt mazāka vērtība nekā cita cilvēka cieņai. Cilvēka cieņas princips neļauj valstij atteikties no pamattiesību nodrošināšanas noteiktai personai vai personu grupai. Sabiedrībā pastāvoši stereotipi nevar kalpot par konstitucionāli attaisnojamu pamatu noteiktas personas vai personu grupas pamattiesību liegšanai vai ierobežošanai demokrātiskā tiesiskā valstī."[15]

Tā ir jaunākās judikatūras esence: cilvēka cieņā balstīta ikvienas personas pašnoteikšanās tiesība, kas jāievēro ne tikai valstij, bet arī sabiedrībai. Lai to sasniegtu, ir jāpēta sabiedrībā valdošie stereotipi, to noturība un juridiskās sekas.

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[10] Diez-Medrano, J. (2007). Nationalism, Ethnic Conflict and Democratic Govarnance. In *Democracy and Human Rights in Multicultural Societies.* M. Koenig, P. De Guchteniere (Eds.). Hampshire, Burlington, Ashgate, 22–24.

[11] Lehman, J., Phelps, S. (2005). *West's Encyclopedia of American Law.* Michigan: Thomson/Gale, 510.

[12] Cotterrell, R. 2018. *Sociological Jurisprudence. Juristic thought and social inquiry.* London, New York: Routledge, 75–88.

[13] Horn, N. (2007). *Einfürung in die Rechtswissenschaft und Rechtsphilosophie.* 4. Auflage. Heidelberg, C. F. Müller, 76– 77.

[14] Rezevska, D. (2015). *Vispārējo tiesību principu nozīme un piemērošana.* Rīga: Daiga Rezevska, 39–46.

[15] Satversmes tiesas 2020. gada 12. novembra spriedums lietā Nr. 2019-33-01.

Sabiedrības stereotipi un atsevišķu sociālo grupu stigmatizēšana

Sabiedrības locekļi veido tādas savstarpējās attiecības, tostarp tiesiskās, kādas tiek atzītas par pareizām un pieļaujamām konkrētās sabiedrības kolektīvajā apziņā. "Ģimene, valsts un pašas sabiedrības organizācija, pielietotie sodi un slēgtās vienošanās ir to ideju turpinājums, kas sabiedrībā valda pār sabiedrību, valsti, tiesiskumu...," rakstīja Emīls Dirkhems (*Émile Durkheim*, 1858–1917).[16] Sabiedrībā valdošos uzskatus veido vairākuma priekšstati par pareizo, un tie transformējas lēni.[17] Pēdējie simts gadi līdz ar demokrātiskas tiesiskas valsts un pamattiesību nostiprināšanos ir būtiski un strauji mainījuši mūsu dzīvi. Tāpēc svarīgi, lai sabiedrības priekšstati būtu mainījušies atbilstoši tiesiskajai realitātei.

Šobrīd pastāvošā visaptverošā vienlīdzība Rietumu sabiedrībā ir izveidojusies pavisam nesen. Līdz pat 20. gadsimta otrajai pusei vienlīdzīgo loks bija ievērojami šaurāks. Pat virknē Rietumeiropas valstu sievietes juridisko līdztiesību ieguva tikai pagājušā gadsimta 60.–80. gados, bet par faktisko vienlīdzību cīņas notiek joprojām.[18] Vēsturiski ikvienā sabiedrībā atsevišķas sociālās grupas ir tikušas ne vien ierobežotas savās tiesībās, bet pat stigmatizētas. Stigma ir personas īpašība, uzvedība vai nodarbošanās, ko sabiedrība saskaņā ar valdošajiem stereotipiem uzskata par nepiedienīgu vai apkaunojošu. Stigmai var būt divi pamati: pašas personas "defekts", proti, iedzimtas īpatnības, kas nesakrīt ar sabiedrībā valdošajiem uzskatiem par "normalitāti", vai "vaina", kas izriet no personas rīcības.[19] Bieži persona, kas tiek stigmatizēta, vienlaikus tiek sociāli atstumta.[20] Arī valsts ar tiesību normām var sekmēt atsevišķu sabiedrības grupu stigmatizāciju, personām, kas pieder pie šādas grupas, ierobežojot darbības modeļu izvēli.[21] Tas var novest pie šo personu diskriminācijas.

Veidojot iekļaujošu sabiedrību, tieši sabiedrības iepriekš stigmatizēto grupu līdztiesības īstenošanā valstij būtu jāiegulda vislielākās pūles. Lai to īstenotu, valstij visupirms ir jāapzinās tās sabiedrības grupas, kas vēsturiski ir tikušas stigmatizētas. Tas nav viegls uzdevums, jo, dzīvojot sabiedrībā, visi (tostarp parlamenta deputāti, ministri, ierēdņi un tiesneši) ir socializējušies vienā kolektīvajā apziņā, tādējādi uzzinot ne tikai vērtības un uzvedības noteikumus, bet arī valdošos (tostarp novecojušos) stereotipus. Tāpēc, lai nodrošinātu tiesību prasībām atbilstošu cilvēka cieņu ikvienam sabiedrības loceklim, likumdevējam ir mērķtiecīgi jānoskaidro grupas, kuru locekļu cilvēka cieņa konkrētā sabiedrībā varētu tikt apdraudēta.

Sabiedrības stigmatizētas grupas var atrast, piemēram, folklorā, kas ietver sabiedrības vēsturisko kolektīvo apziņu ar visiem tajā valdījušajiem stereotipiem. Piemēram, visai

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[16] Durkheim, E. (1965). *Regeln der soziologischen Methode.* Neuwied und Berlin: Luchterhand, 118.

[17] Würtenberger, T. (1991). *Zeitgeist und Recht.* Tübingen: Mohr Siebeck, 100.

[18] Reder, M. (2018). *Philosophie pluraler Gesellschaften.* Stuttgart: Kohlhammer, 129–135.

[19] Goffman, I. (1963). *Stigma: Notes on the Management of Spoiled Identity.* N.Y.: Prentice-Hall. https://www.hse.ru/data/2011/11/15/1272895702/Goffman_stigma.pdf

[20] Dobelniece, S. (2020). Sociālā atstumtība. No: *Nacionālā enciklopēdija.* 21.09.2020. https://enciklopedija.lv/skirklis/2650-sociālā-atstumtība-

[21] Grevcov, J. (2003). *Sociologija.* Sankt-Peterburg: Juridicheskij centr press, 455.

tipiski ir nievājoši sakāmvārdi par nacionālajām minoritātēm: krieviem,[22] lietuviešiem,[23] ebrejiem[24] un romiem.[25] Vērtējama ir arī folklorā paustā attieksme pret trūcīgām personām, kas pārtiek no sabiedrības labvēlības (mūsdienās – pabalstiem). Trūcīgas personas daudzos sakāmvārdos tikušas pielīdzinātas sliņķiem[26] vai pat zagļiem: "Dienas laikā ubags, nakts laikā zaglis"; [27] "Dīdelnīka maize – kauna maize"; "Dīnu dīdelnīks, naktu zaglis".[28] Šobrīd mūsu sabiedrībā ir aktīva labdarības tradīcija, lai citstarp palīdzētu trūcīgām personām. Tomēr zināma stigma, kas trūkumu visupirms saista ar pašas personas vainu, proti, slinkumu, dīkdienību un izlaidīgu dzīvesveidu, mūsu sabiedrības kolektīvajā apziņā iezīmējas arī šodien. To apliecina gan Satversmes tiesas apkopotie materiāli lietās par atbalstu trūcīgām personām,[29] gan sabiedrības reakcijā, kas publicēta sociālajos tīklos pēc spriedumu pasludināšanas.[30]

Tomēr, pētot Satversmes tiesas pēdējās desmitgades judikatūru no cilvēka cieņas un vienlīdzības kritērija aspekta, domāju, ka skaidri iezīmējas sabiedrības un valsts visvairāk stigmatizētā sociālā grupa – sodītas personas. Ja par citām vēsturiski stigmatizētām grupām, piemēram, par personām ar garīgās veselības problēmām, nacionālajām un

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[22] Piemēram, "Iet kā sūdnieka krievs". Latviešu folkloras krātuve. *Garamantas.lv*. Vienība Nr. 1038. http://garamantas.lv/lv/unit/114344/LFK-145-1038

[23] Piemēram, "Apģērbies kā leitis". Latviešu folkloras krātuve. *Garamantas.lv*. Vienība Nr. 19455. http://garamantas.lv/lv/unit/108912/LFK-17-19455

[24] Piemēram, "Čigāns skatās zirgam zobos, žīds – zem astes". Latviešu folkloras krātuve. *Garamantas.lv*. Vienība Nr. 1931. http://garamantas.lv/lv/unit/80868/LFK-2063-1931

[25] Piemēram, "Čigāns ņem visu, kas nav piesiets". Latviešu folkloras krātuve. *Garamantas.lv*. Vienība Nr. 8161. http://garamantas.lv/lv/unit/125886/LFK-556-8161

[26] "Kas kūtri strādā, top nabags". Latviešu folkloras krātuve. *Garamantas.lv*. Vienība Nr. 5229; "Neguli, ka netopi nabags". Latviešu folkloras krātuve. *Garamantas.lv*. Vienība Nr. 2011. http://garamantas.lv/lv/unit/86799/LFK-94-2011

[27] Latviešu folkloras krātuve. *Garamantas.lv*. Vienība Nr. 5534. http://garamantas.lv/lv/unit/91181/LFK-94-5534

[28] Latviešu folkloras krātuve. *Garamantas.lv*. Vienība Nr. 2823. http://garamantas.lv/lv/unit/184259/LFK-1940-2823

[29] Tas parādās Satversmes tiesas lietu materiālos par atbalstu trūcīgām un maznodrošinātām personām, senioriem un personām ar īpašām vajadzībām, piemēram, Satversmes tiesas 2020. gada 25. jūnija spriedums lietā Nr. 2019-24-03; Satversmes tiesas 2020. gada 10. decembra spriedums lietā Nr. 2020-07-03; Satversmes tiesas 2021. gada 10. februāra lēmums par tiesvedības izbeigšanu lietā Nr. 2020-19-0103.

[30] Piemēram, "Nesaprotu, kāpēc valstij būtu kaut kādai iedzīvotāju daļai kaut kas jāmaksā tāpat vien, bet citiem jāpelna priekš sevis un pagasta dzērāja."; "Eiropas tiesā jāsūdz ST un Jansons, kuri grib, lai jebkurš dīkdienis saņemtu "cilvēka cienīgu" GMI. Nav runa par invalīdiem un citiem, kuri nav bijuši spējīgi strādāt, bet, pirmkārt, aplokšniekiem un t. t."; "Ka padibenes izvēlējušās tādu dzīves veidu, ko nevar nosaukt par civilizētu. Tagad pamatā visi atrodas Rīgā, kur viņus ēdina, dzirdina, guldina pa brīvu. Nemaz nevajadzēja celt kaut kādu komunismu, tagad kapitālismā sasnieguši savu labklājību." u. c. anonīmi komentāri rakstam "Garantētais minimālais ienākumu līmenis neatbilst Satversmei." *Delfi*. 25.06.2020. https://www.delfi.lv/news/national/politics/garantetais-minimalais-ienakumu-limenis-neatbilst-satversmei.d?id=52253591]

seksuālajām minoritātēm, laika gaitā daļa sabiedrības locekļu ir mainījuši savu viedokli un šīs grupas atbalsta pietiekami spēcīga sociālā kustība un nevalstiskās organizācijas, tad tikai retais būtu gatavs iestāties par augstiem pamattiesību standartiem sodu izpildē un par smagiem noziegumiem sodītu personu līdztiesību pēc sodāmības dzēšanas.

Latviešu kultūrā valda uzskats, ka nav mazu un lielu noziegumu, jo "samaitāta" persona ir spējīga uz visu – "Kas zaglis, tas slepkavs"[31] –, un ikviena sodīta persona ir potenciāls recidīvists, jo "Kāda vārna pērta, tāda nepērta".[32] Latvieši tradicionāli ir uzskatījuši, ka sods nemaina "personas dabu". Šīs latviešu kolektīvās apziņas uzskati korelē ar 19. gadsimta beigu un 20. gadsimta pirmās puses kriminologu atziņām, ko formulēja Čezāre Lambrozo (*Cesare Lambroso*, 1836–1909)[33] un viņa skolnieki, – Rafaels Garofalo (*Raffaele Garofalo*, 1852–1934)[34], kurš no Lambrozo darbu tēzēm izveidoja plaši pazīstamo "par noziedznieku dzimušas personas" tipu,[35] un Enriko Ferri (*Enrico Ferri*, 1856– 1929)[36].[37] Tomēr šādi uzskati, kas stigmatizē uz mūžu, pamatojot pamattiesību ierobežojumus veselai grupai personu, neatbilst demokrātiskas tiesiskas valsts prasībām, kas noteic respektēt ikvienas personas cieņu.

Satversmes tiesa savā judikatūrā ir vērtējusi ievērojamu skaitu ar sodu izciešanu un sodītu personu tiesību ierobežojumiem saistītu lietu. Lielākā daļa no apstrīdētajām normām ir tikusi atzīta par neatbilstošām Satversmei, un lietu materiāli ļauj vērtēt valsts un sabiedrības attieksmi, nosakot ierobežojumus sodītām personām.

Turpmāk, analizējot Satversmes tiesas judikatūru par sodītu personu pamattiesību ierobežojumiem, tiks vērtēti divi kritēriji, kas izriet no stigmatizācijas teorijas:

1) stigma personai tiek uzlikta uz mūžu, proti, sodītas personas tiesību ierobežojumi turpinās pēc sodāmības dzēšanas;
2) uzskats, ka stigmatizētai personai nepienākas apmierināt tādas vajadzības, kas citiem sabiedrības locekļiem veido minimālo standartu,[38] tostarp ģimenes saišu uzturēšanā.

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[31] Latviešu folkloras krātuve. *Garamantas.lv.* Vienība Nr. 1838. http://garamantas.lv/lv/unit/86606/LFK-94-1838

[32] Latviešu folkloras krātuve. *Garamantas.lv.* Vienība Nr. 1131. http://garamantas.lv/lv/unit/148037/LFK-1136-1131

[33] Hattenhauer, H. (1999). *Europäische Rechtsgeschichte.* 3. Auflage. Heidelberg: C. F. Müller, 651.

[34] Von Stephanitz, D. (1970). *Exakte Wissenschaft und Recht.* Berlin: Walter de Gruyter & Co, 197.

[35] Holzhauer, H. (1970). *Willensfreiheit und Strafe. Das Probleme der Willensfreiheit in der Starfrechtslehre des 19. Jahrhunderts und seine Bedeutung fürden Schulenstreit.* Berlin: Erich Schmidt Verlag, 178.

[36] Von Stephanitz, D. (1970). *Exakte Wissenschaft und Recht.* Berlin: Walter de Gruyter & Co, 197.

[37] Holzhauer, H. (1970). *Willensfreiheit und Strafe. Das Probleme der Willensfreiheit in der Starfrechtslehre des 19. Jahrhunderts und seine Bedeutung fürden Schulenstreit.* Berlin: Erich Schmidt Verlag, 178.

[38] Stöwsandt, W. (2007). *Gesellschaftliche Stigmatisierung und die Entstehung von Subkulturen – Dargestellt am Beispiel von S/M.* München und Ravensburg: GRIN Verlag, 6–7.

Sodītas personas stigma un pamattiesību ierobežojumi pēc sodāmības dzēšanas

Krimināltiesībās pazīstams ir sodāmības dzēšanas institūts, proti, sodāmība ir personas notiesāšanas juridiskās sekas, kas ir spēkā soda izciešanas laikā un pēc tam līdz sodāmības dzēšanai.[39] Ar sodāmības dzēšanu parasti aprobežojas notiesāšanas juridiskās sekas. *Ne bis in idem* princips strikti nosaka, ka personu nedrīkst par vienu un to pašu nodarījumu sodīt atkārtoti, proti, divas reizes,[40] taču vienlaikus nedrīkst arī personu par vienu nodarījumu sodīt bezgalīgi. Tāpēc krimināltiesībās ir pazīstams sodāmības dzēšanas institūts, kuram vajadzētu nodrošināt, lai persona, kas ir sodu izcietusi un atkārtoti nav pārkāpusi likumu, proti, ir likumpaklausīga, atkal kļūtu pilntiesīga, noņemot noteiktos ierobežojumus.[41]

Sodāmības dzēšana noteiktu laiku pēc soda izciešanas balstās uz cilvēka cieņu un sekmē to, lai persona vēlētos kļūt par likumpaklausīgu pilsoni, kurš atgūst sabiedrības uzticēšanos.[42] Visa tiesību sistēma būtu jāveido tā, lai sekmētu sodītas personas atgriešanos normālā dzīvē, proti, lai ikvienam būtu otra iespēja pilnvērtīgi dzīvot godīgu dzīvi, līdztiesīgi iekļaujoties pilsoniskajā sabiedrībā.

Lai novērtētu to, vai Latvijā visām sodītām personām tiek dota iespēja atgūt pilntiesību pēc sodāmības dzēšanas, par piemēru var kalpot trīs pēdējā laikā Satversmes tiesā pieņemtie spriedumi: par personas, kura tikusi sodīta par smagu vai sevišķi smagu noziegumu, tiesībām strādāt par pedagogu,[43] par sodītas personas tiesībām adoptēt bērnu,[44] par sodītas personas tiesībām ieņemt kapitālsabiedrības valdes locekļa amatu.[45] Visās šajās lietās tika apstrīdētas normas, kuras sodītai personai liedza noteiktas tiesības uz mūžu, proti, personai, kura tikusi sodīta par smagu vai sevišķi smagu noziegumu, neatkarīgi no sodāmības dzēšanas tika liegtas tiesības izvēlēties noteiktu nodarbošanos (lieta Nr. 2017-07-01, arī lieta Nr. 2020-36-01[46]), ieņemt noteiktu amatu (lieta Nr. 2020-18-01), adoptēt bērnus, lai gan pieteikuma iesniedzējam bija laulība ar bērnu māti un faktiski bija izveidojušās ģimeniskas attiecības ar bērniem, kurus viņš gribēja adoptēt (lieta Nr. 2019-01-01).

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[39] Juridisko terminu vārdnīca. (1998). Rīga: Nordik, 239.

[40] Van Bockel, B. (2016). *Ne Bis in Idem in EU Law.* Cambridge: Cambridge University Press, 14.

[41] Izņēmums būtu tiesības ieņemt noteiktus amatus, kas prasa nevainojamu reputāciju, un vēl atsevišķi ierobežojumi, kas būtu attiecināmi uz dzimumnoziedzniekiem un citām sevišķi smagus noziegumus izdarījušām personām, lai neļautu tām apdraudēt tās sociālās grupas, kuru locekļi paši nespēj novērtēt apdraudējumu un novērst to, piemēram, bērnus, personas ar mentālās veselības traucējumiem u. c.

[42] Satversmes tiesas 2011. gada 9. jūnija sprieduma lietā Nr. 2010-67-01, 11.1.

[43] Satversmes tiesas 2017. gada 24. novembra spriedums lietā Nr. 2017-07-01.

[44] Satversmes tiesas 2019. gada 5. decembra spriedums lietā Nr. 2019-01-01.

[45] Satversmes tiesas 2020. gada 17. decembra spriedums lietā Nr. 2020-18-01.

[46] Satversmes tiesas 2021. gada 25. marta spriedums lietā Nr. 2020-36-01.

Eiropas Cilvēktiesību tiesa ir norādījusi, ka tiesiskajam regulējumam, kas piemērojams neatkarīgi no konkrētā gadījuma apstākļiem, ir absolūts raksturs.[47] Savukārt tiesību doktrīnā atzīts, ka par absolūtu aizliegumu uzskatāmas tiesību normas, kas bez jebkādiem izņēmumiem attiecas uz visām personām, kuras nonāk to tvērumā, kā arī tādi tiesību normās ietverti personas pamattiesību ierobežojumi, kuri pēc būtības nav atkarīgi ne no kādiem individuālajiem apstākļiem.[48] Likumdevējam absolūts aizliegums ir jāpiemēro ļoti piesardzīgi, turklāt – vienīgi izņēmuma gadījumā un ievērojot cilvēka pamattiesību prasības. Gan pamattiesību, gan cilvēktiesību jomā valstij ir pienākums rūpīgi izsvērt normas, kas satur absolūtu aizliegumu, un periodiski pārliecināties, vai tik strikts ierobežojums joprojām ir attaisnojams.

Absolūts aizliegums konkrētai personu grupai veikt kādu darbību vai iegūt kādu statusu ir likumdevēja iezīmēta stigma. Satversmes tiesa visās minētajās lietās apstrīdētās normas atzina par neatbilstošām Satversmei, jo "likumdevējam atbilstoši varas dalīšanas principam ir jāizvēlas piemērotākais no tādiem vienlīdz efektīviem alternatīviem risinājumiem leģitīmā mērķa sasniegšanai, kas personas pamattiesības ierobežo vismazāk",[49] bet "apstrīdētajā normā ietvertā absolūtā aizlieguma mērķi līdzvērtīgā kvalitātē ir iespējams sasniegt ar alternatīviem līdzekļiem, proti, paredzot no šā aizlieguma izņēmumus."[50]

> "Izņēmumi no absolūtā aizlieguma var būt dažādi, piemēram, gan tāds regulējums, kas noteiktos gadījumos pieļauj individuālu izvērtējumu, gan likumā precīzi formulēti izņēmumi, gan arī regulējums, kas nosaka periodisku aizlieguma nepieciešamības pārskatīšanu. Piemērotākā risinājuma izvēle ietilpst likumdevēja rīcības brīvībā."[51]

Ja soda izciešanas mērķis – resocializācija[52] – tiek sasniegts, tad nekas neliecina par nepieciešamību ierobežot sodītas personas tiesības arī pēc sodāmības dzēšanas, ja nu vienīgi viņas nodarījumi ir bijuši īpaši smagi (slepkavība, nodarījums pret bērnu dzimumneaizskaramību, bērnu pornogrāfija), un tādēļ sabiedrības drošības labad personai arī turpmāk varētu būt nepieciešami atsevišķi ierobežojumi.[53] Tomēr arī šeit saskaņā ar cilvēktiesību prasībām tie katrā konkrētā gadījumā pēc iespējas ir individuāli jāizvērtē.[54] Savukārt minētajās lietās veselai grupai personu, kuras tikušas sodītas par smagu

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[47] Eiropas Cilvēktiesību tiesas 2007. gada 10. aprīļa sprieduma lietā *Evans v. the United Kingdom*, pieteikums Nr. 6339/05, 89.

[48] Cumper, P., Lewis, T. (2019). Blanket bans, subsidiarity and the procedural turn of the European Court of Human Rights. *International and Comparative Law Quarterly. 68*(3), 613.

[49] *Ibid.*, 19.3.5.

[50] Satversmes tiesas 2019. gada 5. decembra spriedums lietā Nr. 2019-01-01, 24.2.

[51] Satversmes tiesas 2021. gada 28. janvāra spriedums lietā Nr. 2020-29-01, 24.3.

[52] Resocializāciju kā soda mērķi nosaka gan Krimināllikums, gan Sodu izciešanas kodekss. Sk. Latvijas Republikas Krimināllikumu: https://likumi.lv/ta/id/88966-kriminallikums; Latvijas Sodu izpildes kodeksu: https://likumi.lv/ta/id/90218-latvijas-sodu-izpildes-kodekss

[53] Satversmes tiesas 2021. gada 28. janvāra spriedums lietā Nr. 2020-29-01, 19.3.5.

[54] Eiropas Cilvēktiesību tiesas 2007. gada 10. aprīļa spriedums lietā *Evans v. the United Kingdom*, pieteikums Nr. 6339/05, 89.

vai sevišķi smagu noziegumu, tika uz mūžu ierobežotas pamattiesības bez individuāla izvērtējuma. Taču tieši individuāls izvērtējums ļautu noteikt to, vai persona joprojām ir sabiedriski bīstama un tai būtu jāierobežo kādas tiesības. Piemēram, lietā Nr. 2017-07-01 tika vērtēts Izglītības likuma 50. panta 1. punkts, ciktāl tas liedz personai, kura tikusi sodīta par smagu vai sevišķi smagu noziegumu, tiesības strādāt par pedagogu. Pieteikuma iesniedzējs no 1998. gada ir strādājis vidusskolā par peldēšanas fakultatīvo vadītāju. 2009. gadā viņš bijis arī treneris sporta skolā. Labas atsauksmes no darba devējiem un bērniem, atkārtotas sodāmības nav bijis. Taču darbu nācās zaudēt apstrīdētās normas dēļ, jo agrā jaunībā (1994. gadā) viņš ir ticis sodīts. Tāpēc gan vidusskola, gan sporta skola izbeigusi darba tiesiskās attiecības ar pieteikuma iesniedzēju, lai gan viņš darba pienākumus pildījis godprātīgi un nekas viņa dzīvē nav liecinājis par noziedzīgām tieksmēm.[55] Tieši iedziļinoties lietu faktiskajos apstākļos, acīmredzama kļūst tiesību sistēmā sodītām personām iezīmētā stigma, kuras neatbilstību vienlīdzības un iekļaujošas sabiedrības prasībām iezīmē konkrētas personas dzīves ceļš – pēc vienīgās sodāmības persona ir guvusi mācību un dzīvo likumpaklausīgu dzīvi, tomēr sabiedrības acīs ikviena sodīta persona tiek stigmatizēta un līdz ar to diskreditēta uz mūžu.[56]

Sodītu personu stigmatizācijai ir nopietnas sekas – jo īpaši, ja tā liedz vai ierobežo šīm personām tiesības legāli pelnīt iztiku. Gadījumā, ja tiek ierobežotas sodītas personas iespējas dzīvot likumpaklausīgu dzīvi, lielāka ir iespēja, ka tā atkārtos noziedzīgu rīcību.[57] Proti, nepamatoti ierobežojot sodītu personu iekļaušanos sabiedrības dzīvē, sabiedrība sevi nevis pasargā, bet gan apdraud.

Notiesātas personas tiesības uz ģimenes saišu uzturēšanu soda izciešanas laikā

Satversmes tiesa pēdējo gadu laikā ir izskatījusi vairākas lietas par ierobežojumiem personām, kas izcieš sodu. Vērtējot notiesātās personas ģimenes saišu uzturēšanas standartus Latvijā, zīmīgas ir šādas lietas – lieta par soda izpildes režīmu vīriešiem,[58] lieta par īslaicīgu cietuma atstāšanu tuva radinieka bēru gadījumā,[59] kā arī lieta par aizliegumu tikties ar citiem notiesātajiem, tostarp tiem, kas ir tuvi radinieki.[60]

Lietā par soda izpildes režīmu vīriešiem pieteikuma iesniedzējs vērsās Satversmes tiesā par to, ka apstrīdētā norma nosaka atšķirīgu sākotnējo ieslodzījuma režīmu pilngadīgiem vīriešiem un sievietēm, kas izdarījuši vienāda smaguma noziedzīgu nodarījumu

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[55] Lietas materiāli lietā Nr. 2017-07-01, 1. sēj., 13–16. No: *Latvijas Republikas Satversmes tiesas arhīva materiāli.*

[56] Stöwsandt, W. (2007). *Gesellschaftliche Stigmatisierung und die Entstehung von Subkulturen – Dargestellt am Beispiel von S/M.* München und Ravensburg: GRIN Verlag, 6–7.

[57] Schiller, F. (2006). *Verbrecher aus Infamie.* Berlin: Berliner Wissenschafts-Verlag, 45.

[58] Satversmes tiesas 2019. gada 7. novembra spriedums lietā Nr. 2018-25-01.

[59] Satversmes tiesas 2020. gada 18. septembra spriedums lietā Nr. 2019-32-01.

[60] Satversmes tiesas 2021. gada 15. janvāra spriedums lietā Nr. 2020-21-01.

un notiesāti ar brīvības atņemšanas sodu uz vienādu termiņu. Vīriešiem esot noteikti lielāki pamattiesību ierobežojumi nekā sievietēm. Pieteikuma iesniedzēja galvenie argumenti bija saistīti ar atšķirīgu iespēju ieslodzītiem vīriešiem sazināties un tikties ar tuviniekiem, tostarp bērniem. Satversmes tiesa secināja, ka apstrīdētajā normā ir paredzēta atšķirīga attieksme, kas noteikta pēc personas dzimuma. Lai arī, izciešot sodu, sievietes uzskatāmas par īpaši aizsargājamu ieslodzīto grupu,[61] tomēr laika gaitā situācija var mainīties un var pienākt brīdis, kad valsts īstenoti īpaši pasākumi kādas sabiedrības grupas tiesību aizsardzībai vairs nav nepieciešami un attaisnojami. Proti, kādā brīdī ieguvums no valsts īstenotajiem pasākumiem sieviešu stāvokļa uzlabošanai var neatsvērt kaitējumu, kuru vīriešiem nodara pret viņiem īstenotā atšķirīgā attieksme.[62] Būtiski, ka "kontekstā ar resocializāciju un iekļaušanos dzīvē pēc atbrīvošanas no ieslodzījuma attiecību saglabāšana ar ģimeni ir vienlīdz svarīga kā notiesātajām sievietēm, tā notiesātajiem vīriešiem".[63] Līdz ar to apstrīdētā norma tika atzīta par neatbilstošu Satversmes 91. pantam. Taču, analizējot šo lietu, jāuzsver vēl viena atziņa. Satversmes tiesa vērsa Saeimas uzmanību uz secinājumiem, kurus par situāciju brīvības atņemšanas iestādēs Latvijā paudusi Eiropas Padomes Komiteja spīdzināšanas un necilvēcīgas vai pazemojošas rīcības vai soda novēršanai. Atbilstoši minētajiem secinājumiem apmeklējumu biežums slēgtajos cietumos esošajiem ieslodzītajiem nav pietiekams, īpaši tiem, kuri sodu izcieš soda izciešanas režīma zemākajā pakāpē.[64] Satversmes tiesa uzsvēra, ka tādi tiesību uz saskarsmi ar citām personām ierobežojumi, kādi šobrīd noteikti slēgtajos cietumos, nav pieļaujami attiecībā ne uz vienu ieslodzīto kategoriju.[65]

Lietā par īslaicīgu cietuma atstāšanu tuva radinieka bēru gadījumā tika vērtētas tiesības ieslodzītai personai, kura izcieš brīvības atņemšanas sodu slēgta cietuma soda izciešanas režīma vidējā pakāpē, apmeklēt tuvinieka (pieteikuma iesniedzēja gadījumā – mātes) bēres.[66] Brīdī, kad pieteikuma iesniedzējs vērsās pie cietuma administrācijas ar lūgumu ļaut apmeklēt mātes bēres, Eiropas Cilvēktiesību tiesa (turpmāk – ECT) jau bija pasludinājusi spriedumu lietā *Ēcis pret Latviju*. Mārtiņš Ēcis, atsaucoties uz Eiropas Cilvēka tiesību un pamatbrīvību aizsardzības konvencijas (turpmāk – konvencija) 14. pantu (diskriminācijas aizliegums), skatot to kopsakarā ar konvencijas 8. pantu (tiesības uz ģimenes dzīves neaizskaramību), sūdzējās ECT, ka viņam, izciešot par sevišķi smaga nozieguma izdarīšanu piespriesto cietumsodu slēgta tipa cietumā, bija liegts īslaicīgi atstāt brīvības atņemšanas iestādi sakarā ar tuva radinieka nāvi, kamēr sievietēm,

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[61] Satversmes tiesas 2019. gada 7. novembra spriedums lietā Nr. 2018-25-01, 23.2.

[62] *Ibid.*, 24.

[63] *Ibid.*, 27.

[64] Eiropas komitejas spīdzināšanas un necilvēcīgas vai pazemojošas rīcības vai soda novēršanai 2017. gada 29. jūnija ziņojuma Nr. CPT/Inf(2017)16 par vizīti Latvijā no 2016. gada 12. līdz 22. aprīlim, 92. un 93. punkts.

[65] Satversmes tiesas 2019. gada 7. novembra spriedums lietā Nr. 2018-25-01, 30.

[66] Satversmes tiesas 2020. gada 18. septembra spriedums lietā Nr. 2019-32-01.

kas izcieš sodu, šāda ierobežojuma nav. ECT 2019. gada 10. janvāra spriedumā secināja, ka pieļauts konvencijas 14. panta pārkāpums, skatot to kopsakarā ar 8. pantu.[67] Savukārt laikā, kad aplūkojamā Satversmes tiesas lieta tika sagatavota izskatīšanai, stājās spēkā grozījumi Latvijas Sodu izpildes kodeksā (turpmāk – kodekss), atbilstoši kuriem tas tika papildināts ar 49.[4] pantu. Šajā normā noteiktas jebkura notiesātā tiesības atvadīties no miruša radinieka ieslodzījuma vietas teritorijā.[68] Saeima uzskatīja, ka notiesātajiem, kas sodu izcieš slēgtajā cietumā, vairs netiekot liegtas tiesības atvadīties no mirušā tuvinieka, un tādēļ ir pamats izbeigt tiesvedību lietā.[69] Satversmes tiesa, vērtējot apstrīdēto normu, secināja, ka grozījumi kodeksā nav pamats izbeigt tiesvedību lietā, jo

> "[T]uva radinieka bēru apmeklējums ļauj ne tikai atvadīties no mirušā, bet arī atdot viņam godu, pēdējā gaitā izvadot, [..] un pēc tuvinieka nāves rast mierinājumu kopā ar citiem tuviniekiem [..]. Bēru rituāls sabiedrībā ir it īpaši nozīmīgs, tas uzskatāms par augstākās nozīmes kultūras notikumu. Sociāliem rituāliem ir simboliska un emocionāla nozīme, un tie tuviniekiem ļauj kopīgi izjust un izprast dzīves svarīgākos notikumus".[70]

Savukārt attiecībā uz mirušas personas ķermeņa vešanu "atvadīties" uz ieslodzījuma vietu Satversmes tiesa uzsvēra: "Konstitucionālā vērtība – cilvēka cieņa – nozīmē, ka arī pēc cilvēka nāves pret viņa ķermeni ir jāizturas ar cieņu, tostarp, cik iespējams, ņemot vērā aizgājēja pēdējo gribu."[71] Satversmes tiesa atzina apstrīdēto normu par neatbilstošu Satversmes 96. pantam, jo pastāv alternatīvs, ieslodzītās personas tiesības uz privātās dzīves neaizskaramību mazāk ierobežojošs līdzeklis (pēc ieslodzītās personas lūguma ļaut tai īslaicīgi atstāt brīvības atņemšanas vietas teritoriju) – individuāla izvērtēšana. Šāds regulējums ļautu individuāli izvērtēt risku, kādu katrs ieslodzītais varētu radīt sabiedrības drošības interesēm. Tādējādi vienlaikus tiktu aizsargāta gan sabiedrības drošība, gan ieslodzītā tiesības uz privātās dzīves neaizskaramību.[72]

Apstrīdētajās normās, kuras minētajās lietās vērtēja Satversmes tiesa, personai, kas izcieš sodu, nepamatoti tika ierobežota vai liegta saskarsme ar ģimenes locekļiem, nepieļaujot vērtējumu tam, vai sabiedrības drošību apdraud iespēja konkrētajai ieslodzītajai personai satikt tuviniekus vai apmeklēt tuvinieka bēres. Visos gadījumos bija iets pa striktāko ierobežojumu ceļu. Par smagiem noziegumiem sodītas personas tika sociāli atstumtas, tostarp ierobežojot kontaktus ar pašiem tuvākajiem – ģimenes locekļiem. Spriežot pēc sociālajos medijos paustajiem viedokļiem pēc minēto spriedumu pasludināšanas, daļā

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[67] Eiropas Cilvēktiesību tiesas 2019. gada 10. janvāra spriedums lietā *Ēcis v. Latvia*, pieteikums Nr. 12879/09.

[68] 49.[4] pants: Notiesātais ar rakstveida iesniegumu brīvības atņemšanas iestādes priekšniekam var lūgt atļauju atvadīties no miruša radinieka brīvības atņemšanas iestādes teritorijā brīvības atņemšanas iestādes pārstāvja klātbūtnē (vizuālās kontroles apstākļos). Latvijas Sodu izpildes kodekss: Latvijas Republikas likums. https://likumi.lv/ta/id/90218-latvijas-sodu-izpildes-kodekss

[69] Satversmes tiesas 2020. gada 18. septembra spriedums lietā Nr. 2019-32-01, 3.

[70] Satversmes tiesas 2020. gada 18. septembra spriedums lietā Nr. 2019-32-01, 12.

[71] *Ibid.*

[72] Satversmes tiesas 2020. gada 18. septembra spriedums lietā Nr. 2019-32-01, 18.2.

sabiedrības valda neizpratne, kāpēc "jāauklējas" ar noziedzniekiem. Īpaši asu kritiku Satversmes tiesa izpelnījās pēc tam, kad tika pasludināts spriedums par notiesātas personas tiesībām lūgt apmeklēt tuvinieka bēres. "Noziedzniekam NEKAS nepienākas, tā ir soda būtība, ka ne uz bērēm, ne citu iemeslu dēļ tu ārā no cietuma netiksi. Aci pret aci, zobs pret zobu." Arī cits ieraksts vēstī: "Zaglim vieta ir cietumā! Par bērēm un savu privāto dzīvi vajadzēja domāt pirms tu pārkāpi citu cilvēku dzīvi."[73] Līdzīgi tika izteikts viedoklis arī par Satversmes tiesu: "Tikai morāli invalīdi var iestāties par *zeku* tiesībām."[74]

Līdz ar to var secināt, ka personas, kas izcieš sodu, jo īpaši tās, kas izcieš sodu par smagiem noziegumiem, Latvijas sabiedrībā tiek stigmatizētas, neattiecinot uz tām sabiedrībā valdošās prasības pēc privātās dzīves neaizskaramības aizsardzības, lai nodrošinātu ģimenes saišu uzturēšanu. Par smagiem un sevišķi smagiem noziegumiem sodītas personas "sabiedrības acīs" ir sevi diskreditējušas, tāpēc sabiedriskā doma tās neuztver kā līdztiesīgas un atstumj, atstāj "ārpus likuma", neuzskatot par nepieciešamu tām nodrošināt pamattiesības pat minimālā līmenī. Tāpēc būtiska ir tiesas, jo īpaši konstitucionālās justīcijas, loma, lai nodrošinātu sodītu personu cilvēka cieņas aizsardzību un pamattiesību īstenošanu.

Secinājumi

1. Satversmes tiesas judikatūrā formulēti kritēriji, kas ļauj vērtēt Latviju kā demokrātisku tiesisku valsti. Viens no šiem kritērijiem ir no cilvēka cieņas izrietošās prasības valstij nodrošināt ikvienas personas tiesības un brīvību, ievērojot vienlīdzības principu.
2. Satversmes tiesa ir vērtējusi daudzas normas, kas skar sabiedrības mazāk aizsargātās sociālās grupas: bērnus, seniorus, trūcīgas un sodītas personas, kā arī etniskās un seksuālās minoritātes. Lai gan likumdevējam ir saistošas no Satversmes izrietošās prasības nodrošināt ikvienas personas cieņu, tomēr realitātē šos procesus citstarp ietekmē sabiedrības apziņā valdošie stereotipi, kas sekmē atsevišķu grupu stigmatizāciju, proti, atzīšanu par sociāli nepilnvērtīgām. Tāpēc personas, kas pieder šādai grupai, tiek ierobežotas savās tiesībās.
3. Valsts spēj veicināt iekļaujošu sabiedrību, mazinot sociālās atstumtības riskus, tikai apzinoties sabiedrības jau vēsturiski stigmatizētās grupas, kuras tradicionāli ir tikušas sociāli atstumtas. Lai noskaidrotu šādas grupas, var izmantot gan folkloru, gan sociālajos tīklos paustos viedokļus. Likumdevējam ticams avots izpētei ir judikatūra, tostarp Satversmes tiesas spriedumi, kas iezīmē vienu no visvairāk stigmatizētajām sabiedrības grupām Latvijā – sodītas personas.

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[73] Anonīmi komentāri rakstam "Liegumu atstāt cietumu tuvinieka bēru dēļ atzīst par neatbilstošu Satversmei". *Delfi*. 21.09.2020. https://www.delfi.lv/news/national/politics/liegumu-atstat-cietumu-tuvinieka-beru-del-atzist-par-neatbilstosu-satversmei.d?id=52486643

[74] *Ibid.*

4. Satversmes tiesa ir atzinusi par Satversmei neatbilstošām normas, kas ierobežo sodītām personām tiesības uz nodarbošanos un ģimenes dzīvi. Sodītas personas tiek stigmatizētas uz mūžu, jo bez individuāla izvērtējuma tās tiek pakļautas vairākiem pamattiesību ierobežojumiem. Valstij ir jāapzinās, ka sodītu personu stigmatizācijai ir nopietnas sekas gan attiecībā uz pašu sodīto personu, gan sabiedrību kopumā. Ja valsts liedz vai ierobežo šīm personām tiesības legāli pelnīt iztiku, t. i., ierobežo sodītas personas iespējas dzīvot likumpaklausīgu dzīvi, palielinās varbūtība, ka tās atkārtos noziedzīgu rīcību. Proti, nepamatoti ierobežojot sodītu personu iekļaušanos sabiedrības dzīvē, sabiedrība sevi nevis pasargā, bet gan apdraud.
5. Satversmes tiesa ir atzinusi par neatbilstošām Satversmei arī normas, kas regulē sodu izciešanu. Var secināt, ka personas, kas izcieš sodu par smagiem noziegumiem, Latvijas sabiedrībā tiek stigmatizētas, neattiecinot uz tām sabiedrībā valdošās prasības pēc privātās dzīves neaizskaramības aizsardzības, lai nodrošinātu ģimenes saišu uzturēšanu. Šīs personas "sabiedrības acīs" ir sevi diskreditējušas, tāpēc sabiedriskā doma tās neuztver kā līdztiesīgas un atstumj, liedzot elementāras sabiedrībā par normu atzītas tiesības, piemēram, lūgt apmeklēt vecāku bēres. Tāpēc būtiska ir tiesu loma, lai nodrošinātu sodītu personu cilvēka cieņas aizsardzību un pamattiesību īstenošanu.

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Comparison of Emergency State Regulation Experiences in Latvia, France and Belgium

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Abstract

The article analyses the legal framework of emergency state in three countries – Latvia, France and Belgium. The aim of the study is to identify problems thus to improve the national legal framework. Given that the concept of emergency state has gained its relevance in 2020 with the spread of the Covid-19 disease, it has been found that the Emergency State Institute and its legal framework is an important part of every country's national legal system, as it is a mechanism that helps to strengthen national security in case of external and internal dangers. Analysis of the legal framework of emergency state in Latvia in the context of the selected legal framework of two other countries is an effective way to assess whether the national legal framework requires improvements. In the research such methods were used as cognition, monographic, historical, comparative and analytical method, as well as interpretation of legal provisions recognized in scientific law, which contributed to understanding of the scope of legal norms in national constitutions and other related legislation in the context of the topic. In the result of the study differences in national basic laws and special laws were mainly identified, including the aspect of restriction of human rights, thus contributing to reflection and drawing conclusions on the necessary changes to the national framework. Research also outlines functioning and competence of municipality work in an emergency state.

Keywords: Belgium, Covid-19, emergency state, France, Latvia, restrictions on human rights.

Introduction

Research faces three countries – two republics and one Kingdom. There is no doubt that different fates of these countries have created their individual convictions on culture, traditions, religious values, societal well-being, policies, economy, legal system, and other areas. Length of the nation's existence, size of its territory, fights within echelons of power, ethnicity – these are just a few circumstances that have affected their experience stories. Undoubtedly, the greatness of the French Republic has developed for centuries. Most have heard of the dominant dynasties of the history, revolutions with national heroes at the forefront, world-famous writers, and artists. The Kingdom of Belgium, on the other hand, has been a member of several important events – the economic union with the Netherlands and Luxembourg, and was present in the North Atlantic Treaty Agreement Organisation and the establishment of the European Union. And then Latvia, a small but strong-spirited country, which with its basic law preamble multiplied liberty battle victories, Latvian and Liv traditions, Latvian life knowledge, general and Christian values (*Latvijas Republikas Satversme* (Eng. Constitution of the Republic of Latvia), 1922). However, every country's carefully cultivated internal system can be shaken by an unexpected threat or unprecedented situation during which it is necessary to have a working mechanism which ensures continuity of national functions and national security as much as possible, including prevention of effects caused by the danger. That is why the legal framework in the state of emergency is one of the most important components in the national legal system of each country.

Relevance of the research topic is based on the fact that in recent years the number of terror acts has increased, as well as the Covid-19 virus generated pandemic sketched a precursor for the new era – permanent doubts about the surrounding information, opinion collisions, health sector management, financial management, human rights assessment, introduction of the remote work and development of digitalisation; these are just a few of the trends that have developed lately. Consequently, many legal issues, including those that are related to national emergency state regulation, namely, to the ability to effectively apply them, ensuring public security in the case of a threat and simultaneously preventing power abuse. Undoubtedly, the Covid-19 infection has influenced aspects of people's daily life worldwide and has become a national and international problem. Covid-19 situation has changed not only the public's behavioural habits, but also the model of local and international governance (Palkova, 2020). Similarly, during this period, topic of restrictions on human rights and control mechanism for this restriction has become particularly relevant. In addition, emergency state and the restrictions introduced have been a great challenge for public administrations, such as municipalities, that require to restructure their work organisation model and introduce significant changes in everyday work processes.

The aim of the research is to compare the legal framework of emergency state in Latvia, France and Belgium, identifying problems and thus making proposals for the improvement of the national legal framework. In order to facilitate the research

process, the following methods have been used in the course of a research: 1) cognitive method to obtain and accumulate necessary information on the selected topic, summarising rights-based theories, legal historical materials, national constitutions and special laws texts, including judicial decisions and others; 2) monographic method to describe the insights provided in accumulated material, including those raised by other authors, as well as explanations of the concepts and opinions of the author; 3) historical method to provide the reader with an insight into the history of constitutional rights of the nations; 4) comparative method (*comparer* in French, "to compare") – a method to compare national emergency state's legal framework and mechanisms of restrictions on human rights; 5) data analysis method to provide analytical insights for the reader; 6) methods of interpretation of legal norms recognised in scientific laws: grammar-translation method to discover the word composition and meaning of legal norms and concepts used by the author in the course of the study, both explaining concepts related to the research topic and in the further part of the study, translating national legislation norms; a historical method to find out relevant issues in the context of the history of national constitutional rights and to clarify the historical origin and development of specific legislation and its norms; teleological method to detect the true will of the legislator by assessing legislation and constitutional norms of emergency state; systemic approach to define the place of the particular emergency state law in the general legal system, as well as to understand the role of the Constitution's norms in relation to entire text of the Constitution.

Research is based on information from different sources, namely conclusions have been drawn not only based on analysis of national legislations but also on the basis of quotes expressed by law experts in legal literature, both in printed and electronically available resources. The author used a lot of the comments on Constitution of Republic of Latvia, which helped to understand the legal framework of emergency state. On the other hand, regarding the French and Belgian regulation, it is specified that the author has worked with materials in French – national laws, lawyers' opinions, laws, comments, judicial decisions – analysing the application of this regulation in practice and problems that are related to it.

The research topic is rather extensive and can be viewed from several perspectives. Occasionally, an emergency state has been announced during the development of the research, as well as amendments have been regularly made to the legislation. Similarly, the practice of the institution that implements constitutional control, while assessing restrictions on human rights was different, changing, and even controversial. Thus, the research should be updated regularly and be preventively transparent, for example, in a subject to national daily action in the periods of virus outbreak or overcoming the effects caused by the emergency state. In addition, it is essential to point out that during the virus, society encounters new challenges every day, that require appropriate action from the government. Consequently, law enforcement authorities also have an endless task to assess the legal aspect of each new problematic situation.

Emergency State Institute and Its place in the Model of Continental Europe

The author of the research has found that the word "extraordinary" semantically means something that is completely unusual, unexpected, unprecedented; something that has never happened, something that has not been experienced before. The word "emergency" is explained as something what happens beyond the ordinary sequence, arrangement. In turn, the word "extreme" is explained as such that it does not fit into ordinary norms; does not correspond to the usual type; and is special (electronic online dictionary Thesaurus). Consequently, at first look it can be concluded that all explanations of the words are valid and correspond to the nature of the topic. This explanation is also confirmed by the Latvian language explaining dictionary, which indicates that "extraordinary", firstly, is something that takes place beyond the usual arrangement, outside the usual order, for example, an emergency session, meeting, congress, and, secondly, is something that does not match the usual, foreseeable, for example, an exceptional case or events, emergency tasks. In turn, "extreme" is explained as something very unusual, special (*Latviešu valodas vārdnīca* (Eng. Latvian language dictionary), 2006). Also, the Latvian literary language dictionary indicates that the word "extraordinary" means something unusual, unexpected, unmatched, unprecedented, something that has not been experienced before; however, "extreme" means something that does not fit into normal norms, does not correspond to the usual type; something that is particularly big, great (*Latviešu literārās valodas vārdnīca* (Eng. Latvian literary language dictionary), 1972). Thus, the legal framework studied by the author in the context of the research topic is such a legal framework that is related to unusual, unexpected, unprecedented events that were not expected before and do not fit into daily situations. However, despite the indicated explanations of the words, the author has found that in the case of emergency state, the word "crisis" is also often used. This word should be understood as dangerous, complex, severe condition; complex state of transition (electronic online dictionary Thesaurus). Although "crisis" is a versatile word that indicates difficulties in a common situation, the word gets used in another context. Respectively, the term "economic crisis" can be used in the context of a financial situation, "psychological crisis" can be used in relation to mental health, the term of an "energy crisis" also exists. Consequently, it can be noted that the crisis may occur during the period of emergency state, but the crisis itself is not an emergency state. In particular, events that happen in the case of an emergency state may lead to a crisis in a sector or specific area, leaving it with serious consequences, such as the crisis in the health sector or the crisis in the milk production and processing industry, or the crisis in the tourism industry and the like.

It should be remembered that the national law "On emergency situation and state of exception" (*Par ārkārtējo situāciju un izņēmuma stāvokli: Latvijas Republikas likums*, 2013) has clearly distinguished two cases: an emergency situation and a state of exception, so it would not be justified and correct to use the term "emergency state", since it would

not only lead to legal uncertainty in an aspect of its content, but would also confuse the reader, creating misunderstanding about which of the legal regimes is contemplated. First paragraph of Section 4 of the Law determines that the emergency state is a specific legal regime, during which the Cabinet of Ministers has the right to limit the laws and freedoms of public administration and municipal institutions, natural and juridical persons, as well as impose additional obligations on them. In turn, first paragraph of Section 11 of the Law determines that a state of exception is a special legal regime, which can be announced if: 1) the country is threatened by an external enemy; 2) if there is already erupted or is a danger of eruption of civil unrest that threatens national democratic apparatus in a country or in its part.

Looking further in the comments of the Constitution (*Satversme*), and directly, in the commentary on Article 62, it is found that the national territory can be threatened as from land and also from the sea or air. An external threat for the nation can be understood by oral or written statements of foreign state persons, which contain ultimate requirements or threats to use force against the Latvian country, as well as actions that show the possibility of such an action and the campaigns of foreign media, which point to the ideological preparation of invasion. In contrast, civil unrest may take the form of mass disorder, non-compliance and violation of laws, wherein it is not necessary to use an armed force. This should only be done when civil unrest threatens social order or national apparatus and there are no other means to prevent it. Taking into account the abovementioned, and despite the fact that the state of exception is based on exceptional circumstances, it should be recognised that it would not be correct, when talking about the emergency state, to use such word compounds as a "exceptional situation", "state of exception", "emergency state" and the like as synonyms, because the legislator has distinguished two different legal regimes during which, in accordance with the first paragraph of Article 4 and the first paragraph of Article 11, there are legal rights *inter alia* to restrict the rights and freedoms of natural and legal persons in accordance with the procedures specified in the law and to impose additional obligations on them. Similarly, the term "martial law" is often used in the context of a state of exception, which are recognised as synonyms. In the root of this word, the word "war" can be found, which means organised armed fight (electronic online dictionary Thesaurus). This is confirmed by the sixth paragraph of Article 22 of the National Security Law, which determines that war time occurs if an external enemy has committed a military invasion or otherwise turned against the independence of the country, its constitutional apparatus or territorial integrity. Thus, both the "state of exception" and the "martial law" as well as "war time" are not attributable to the emergency state, but a completely different legal regime.

By analysing the given legal explanation of the emergency state, it can be recognised that it does not contain a specific definition, but the second part of the article, despite the separation of two legal regimes, only sets out examples when the emergency state can be declared, namely in the event of such a national threat which is linked to a disaster, its dangers or critical infrastructure threats if nation, societal, environmental, economic

activity, or human health and life is significantly threated. Observing the specified, it has been concluded that the term "emergency state" is an open (flexible) concept, the content of which can be fulfilled with meaning and essence, taking into account existing circumstances and the true will of the legislator. In addition, concepts such as "disaster", "hazard", "threats" also belong to the institute of emergency state, and to understand those a systemic look is necessary. "Relevance" also has a crucial meaning which is an important criterion in the legal basis for announcement of emergency state. Several terms that are associated with an institute of emergency state are open concepts which obtain their content in the way of interpretation, and in order to fulfil them other laws should be studied, such as the already mentioned National Security law or Civil Protection and Disaster Management law. Similarly, other sector laws contain legal provisions indicating to the occurrence of exceptional circumstances, such as the Law on Forests or Energy law.

To prevent legal uncertainty, the author of the study calls for precise use of the concepts, but it is also important not to forget that the key is to focus not only on the use of conservative concepts, but fundamental understanding of them is important, understanding, when limits of each concept's interpretation end. It can also be concluded that these concepts can not only be looked upon with the vocabulary and with help of various comments, but their essence is revealed through the relevant national legal acts in conjunction with the legal system. The national legal system of each country is different; however, the researched countries are participants of Western law circle and belong to the Roman-Germanic law, thus, they must be similar in their legal systems and therefore similar in matter of the legal framework of the emergency state, including the terminology used.

The author of the study has found that the X–XII century can be considered as the high Middle Ages when the map of legal circles and tribes that are typical to modern Europe, began to develop. At the time, by marking trends for further development, England formed a legal and judicial system, continental European laws also continued their revolution. After assimilation of Roman Law in the Middle Ages, the legal circle of Roman-Germanic law and the rights of Scandinavian countries were formed. After the collapse of the Carolingian empire, a new political map started to emerge in continental Europe. Alongside to the German Holy Roman Empire, France was formed. Here two tribes of a Roman-Germanic circle were forming: 1) Roman-French; 2) German in their own German empire and in its vassal states. Continental Europe was divided into the language groups: in Roman countries – France, Italy, Spain, Portugal, but in German – Scandinavian countries and Germany. The Roman-Germanic tribe has developed in the course of shared history and is rooted in the law of Roman Empire (Osipova, 2004). Thus, in the author's opinion, it is presumable that researched countries, based on the common past law development processes, have naturally similar "beliefs" on the principles applicable in the state of emergency, since an assimilation of Roman law took place in those countries, so they have a similar legal framework basis, which is a considerable fact in comparison to the emergency state legal framework.

Significantly, Roman Republic was first to recognise the need for an exact specific legal regime, which was the national apparatus for the possibility of simplifying and militarising the extreme danger of the Republic of Latvia, introducing an extraordinary magistrate-dictatorship for a specified amount of time. The purpose of the transformation of such national apparatus was to facilitate rapid and energy political action for prevention of certain domestic or foreign crisis, giving significant political power to one person. Renaissance policy philosopher Nikolo Makjavelli saw the example of national wisdom in the development of dictatorship Institute in the Republic of Rome, as Romans were able to connect the need for protection of the national apparatus with the preservation of the legal apparatus, as the dictatorship was also subjected to the legal framework. Following the example of the Roman Republic, many countries began to incorporate public authority organisations within the emergency state situations, that would allow to organise better protection of the national apparatus against domestic or external threats. Traditionally, in relation to the organisation of the national apparatus in the state of emergency, the British model and the Continental Europe model, that is based on French national apparatus, are distinguished. Continental European model is characterised by the fact that a special framework is made in advance for the emergency powers and circumstances in which the government is entitled to decide on the use of these powers. Overcoming of the national threat takes place in accordance with the requirements of the law, which has been adopted and regulates general government action in such a situation. Such a model is also embedded in our Constitution (*Satversme*), namely, when national action in the event of a hazard is previously regulated (*Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets* (Eng. *Comments of the Constitution of the Republic of Latvia. Chapter III. State President. Chapter IV. Cabinet of Ministers*), 2017).

Basic Law as a Basis for Announcement of Emergency State

Before exploring the legal framework of national emergency states, it is necessary to find out whether the introduction of the emergency state at all arises from the nation's Legal instrument of highest judicial power – Constitution. In addition, it is useful to find out how the emergency state is strengthened in the basic law of each researched country, namely, whether its justice *expressis verbis* derives from the text of the Constitution or the introduction of such a state is justified by the application of the interpretation methods of legal norms that are recognised in the legal theory, in particular, teleological and historical method. Also, given the fact that the emergency state is related to restrictions on human rights, it is also important to find out how the basic law of each country incorporates rules on restrictions on human rights. That is, whether the country has chosen to incorporate a general clause of restriction on human rights in its constitution, or it has chosen to indicate the amount of each particular restriction or has opted for another variant.

Constitution is the basic law of the nation, a social contract, which unites all citizens and determines foundation of nation and society, and which, on the whole, constitutes one of the key factors of public legitimacy. Most of the nations' constitutions usually determine two ways of exercising public authority – normal and emergency. The text of the Constitution governs the implementation of the public authority under normal conditions where the constitutional facility is not compromised and public authorities are able to implement all the functions granted by the Constitution. Any country must take into account the occurrence of emergency situation, where a country`s existing constitutional apparatus or even the existence of the country is at risk. For this reason, the Constitution provides for the implementation of public authority in case of emergency (extraordinary) state. Mostly, such circumstances are determined, with occurring of which it is possible to decide on the transformation of the public authority organisation, as well as the public authority bodies, which are authorised to act in emergency situations (*Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets* (Eng. *Comments of the Constitution of the Republic of Latvia. Chapter III. State President. Chapter IV. Cabinet of Ministers*), 2017).

The highest law of our country does not literally contain an emergency state's concept. However, although there is no *expressis verbis* (clearly expressed) regulated action during the emergency state in our Constitution, such as the scope of credentials of the Cabinet of Ministers, it contains guidance on the possibility of emergency situations, indicating that such circumstances are considered. Consequently, the justice of emergency state is based on translating the text of the Constitution with the interpretation methods of legal norms recognised in law, as well as applying the principle of unity of the *Satversme*. Understanding the legal framework of the emergency state and the issue of restriction on human rights also derives from Article 62 of the *Satversme*. Its commentary states that the doctrine of *raison d'état*, which recognises that the country's prosperity is placed higher than the freedom of an individual. Similarly, the fact that the Satversme does not contain a separate article on the right to declare an emergency state in the case which is not related to the external enemy threats or domestic civil unrest, immediately does not mean that this question is not constitutionally adjusted at all.

It is important that, despite the abovementioned, *Satversme* is suitable for overcoming the threat in an emergency state and determines all the required minimum that national constitutional bodies, institutions and officials, as well as the society in general could cope with the challenges of emergency state. Experience in an emergency state shows that Constitution (*Satversme*) is a sufficient legal framework for national action, setting the objectives, basic principles and functions of national constitutional bodies (Levits, 2020). During the emergency state, *Satversme* is also in charge and applicable without being violated. It is only the sound attitude and consciousness that it does not restrict on innovative solutions, and it is not necessary to stick to conservative approaches, that is important (Pastars, 2020). Furthermore, in opinion of the Constitution draft author, it is based on the principles of France and England's democracy and traditions, which helps

in turn of the time stream (Dravnieks, 2020). Consequently, it is also appropriate to look at legal provisions incorporated in the Basic Law of the French V Republic.

There is no doubt that the adoption of the Basic Law of each country was influenced by specific historical events and testimonies, public authorities and regimes, experience of other countries, different associations and contemporary ideas and the like. Similarly, the content of its own time modern constitutional rights and examples of other countries have given their influence. If we compare it with Latvia, the Constitution of the French Republic has had a "tough fate", since, overall, from 1789 to 1815, it could be talked about ten different variations of the Constitution. By getting acquainted with the text of the Constitution, the author of the study has concluded that it has not clearly and specifically, i.e. *expressis verbis*, regulated institute of emergency state. However, it has been found that Article 16 of the Constitution plays an important role in the context of the national emergency state legal framework. Namely, the first paragraph of that article provides for a situation where the independence of the Republic's institution, nation, the integrity of the territory or the fulfilment of international obligations is compromised in a serious and immediate manner, and the regular operation of constitutional public authority is terminated, then the President, consulting with the Prime Minister, both Presidents of the Parliament Chamber and Constitutional Council must take appropriate measures required by the given circumstances. The second paragraph of Article 16 of the Constitution determines that the President must make a report about it to the nation. The third paragraph of the relevant article, on the other hand, points out that the measures taken must be based on the desire to ensure the functioning of the constitutional public authorities, as well as these measures must be feasible as soon as possible with the least possible means to accomplish the task. It is essential that the fifth part of the Article contains the concept of "extraordinary powers", namely that the National Assembly must not be eliminated, using existing extraordinary government powers. In addition, the sixth paragraph of the Article states that, after thirty days of extraordinary powers, it is necessary to examine whether Article 16 of the Constitution really being implemented, competent parties giving their views in the form of a shared opinion, which should be done as soon as possible (Assemblée nationale, 1958).

When assessing the Constitution of the French Republic, similar to the Latvian Satversme (Constitution), the author of the research, wishing to find out the way to secure a mechanism of restrictions on human rights in the basic law, has found that the legal literature states that the restriction on human rights is commonly justified by Article 34 of the Constitution of the French Republic. It determines that exactly the law is what determines the rules on human civil rights, foundational basic rights and public freedoms. Consequently, it can be concluded that the number of human rights is also set separately in the law. As the French Constitutional Council has pointed out, the foundational basic human rights are enshrined in law acts given to the preamble to the Constitution – the preamble to 1958 Constitution, that is, the Treaty of human and citizen rights, the Constitution of 27 October 1946 and the Charter for

the Environment of 2004. These foundational rights can be restricted for the purpose of providing the public order; however, whether or not the freedom of persons is being unduly violated, is controlled by the Constitutional Council. It should also be pointed out that the justice of the restrictions on human rights is always based on the Declaration of the Rights of Man and of the Citizen that is added to the annex of the Constitution of French V Republic, to its legal norms, and directly, this Article 4 provides that the freedom consists of the opportunity to do anything that does not harm another person, thus, there are no restrictions on the use of natural rights of each human, except for those who provide to other members of the society an opportunity to exercise these rights. In turn, from the Article 5 of this declaration follows that the law can prohibit harmful actions to the society and no human can be forced to do what the law does not support. It should also be pointed out that, according to the first paragraph of Articles 61 of the French Constitution, if the person claims that the relevant legal act violates the rights and freedoms guaranteed by the Constitution, this issue can be dealt with by the Constitutional Council (Assemblée nationale, 1958).

Thus, the concept of an emergency state in the Constitution of the Republic of France is constitutionalised in Article 16, which sets out two preconditions that must be met in order that the President of the Republic could obtain extraordinary powers. However, to understand the constitution – just like the *Satversme* – interpretation methods of legal norms should be used. Basic laws of both countries point to the need to take all necessary measures required by emergency circumstances but do not *expressis verbis* regulate the greatness of powers nor explain the extent to which these powers may reach. It cannot be argued that the French Basic Law would have constitutional absence of an emergency state's concept, as there are references to the President's extraordinary powers, but there is no reason to claim that the emergency state as a special legal regime would be strengthened by the French Constitution as a separate rule, which would provide for an announcement such a regime. On the other hand, with regard to the restriction on human rights, Article 34 of the French Constitution indicates that restrictions on human rights and their amount are determined by a separate law, but the restriction clause itself is determined by Article 4 of the Declaration of the Rights of Man and of the Citizen.

Regarding the Belgian constitution, differences in the researched countries – Republic and Kingdom – must be indicated. Republic is a country that belongs to the people. It means free apparatus, but democracy in its nature is freedom. In the Republic, all institutions of public authority are directly or indirectly established according to the nation's will and its institutions are established only in elections, and the status of any official does not have a personal privilege. Also, all public authorities are responsible for their activities. Therefore, the word "republican" not only means "non-monarchical", but it also represents a constitutional facility, which is ruled by a nation, not by some separate persons (*Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets* (Eng. *Comments of the Constitution of the Republic of Latvia. Chapter III. State President. Chapter IV. Cabinet of Ministers*), 2017). In contrast,

Kingdom is a monarchical country, and the king is at its forefront. However, in the context of the Belgian country, it is a federal constitutional monarchy. In this regard, it is noted that the 19th century constitutional state was based on either constitutional monarchy or constitutional republic. Usually, these types of countries were distinguished by the fact that in monarchies the nation's public power was inherited, while power authority of the republic was elected. A head of state (the Republic) – the president – is elected for a fixed period, but in monarchies, monarchs are in office for life. The constitutional king is a lifetime president, and the president is a constitutional king only for a certain period (*Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets* (Eng. *Comments of the Constitution of the Republic of Latvia. Chapter III. State President. Chapter IV. Cabinet of Ministers*), 2017). A constitutional monarchy is essentially a gentler form of monarchy because the King's power in it is limited by the national constitution. Consequently, the king's action under the highest basic law of the country is limited.

Significantly, the Belgian Constitution is the synthesis of the French 1830 and Dutch 1815 constitutions, as well as the English constitutional laws. Unlike innumerable French variants of the National Basic Law, the Belgian Constitution during the period from 1831 to 1914 was reviewed only once (de Vischer, 1986). The author, after reading the text of the constitution of the Belgian Kingdom, has concluded that it does not contain any indication of the possibility of emergency state or the use of extraordinary powers. Belgian law researchers also have pointed out that the Belgian Constitution is not suitable for solving crisis situations. It is one of the oldest constitutions, but it should be reviewed to fully regulate the emergency state, including the extent of extraordinary powers and the rule of law. Just as anti-terrorism measures, emergency measures should be defined as well, because formalisation is the first step of democratic control (Verdussen, 2020). Elsewhere it has been recognised alike that the constitutional system of Belgium is particularly poorly prepared for solving emergency situations, since Article 187 of the Constitution is categorical and states that the Constitution must not be completely or partially suspended. Thus, during the time of emergency state, tension between the nature of emergency state and the norms of the supreme basic law have been created (Clarenne & Romainville, 2020). Similarly, to Latvia and France, whether there is a crisis situation or not, restrictions on basic rights in Belgium can only be performed if they have objective and reasonable justification and they are limited on the basis of legal norms in accordance with the vote of parliamentary assembly (Verdussen, n.d.).

It is important that Article 105 of the Belgian Constitution states that the King has no other power except those he has been officially granted by the nation's Constitution and Specific Laws that has been adopted based on the Constitution itself (Belgian House of Representatives, 2014). Consequently, it can be noted that it is not the case when the State's Constitution does not contain any regulation or only points to the possibility of such a situation by translating legal norms but denies the existence of such a situation

entirely. Such a prohibition immediately requires that, in the period of an emergency state such as war on terror, nuclear disaster, deadly heat wave, devastating weather or epidemics, the government cannot adopt emergency measures that stop the application of constitutional rules, particularly its basic rights. Thus, independent of the severity and intensity of events, authorities should work legally and justly, and any cost and citizens should be able to exercise their foundational rights unhindered, and the legal regime must not be modified. All public authorities during the emergency state in accordance with the Constitution are responsible for application of all its rules (Verdussen, 2020). However, in many cases, legal researchers have responded to the concept of "special powers", which is strengthened in certain laws and includes the possibility for the government to issue special Royal Decrees. They have the same status as the bills adopted by the Parliament, but they do not have to go through the long and complex legislative procedure. The purpose of such a mechanism is the speed, efficiency and the possibility of avoiding the situation when a majority of votes in the Parliament will not be reached. Further on, they must also receive the Parliament's approval, but while the evaluation process is taking place, they can start their activities (Messoudi, 2020). This, however, does not mean that these "special powers" provide government with an unlimited power and the government can do everything that it wants. Consequently, it is important to point out that the Belgian Constitutional Court has stressed that, in direct implementation of these "specific powers", it is necessary to comply with a number of the following principles, to respect the principle of division of power: 1) the use of "special powers" should be based on emergency circumstances; 2) restrictions must be limited in time; 3) objectives that are set and tasks that are necessary to achieve them must be clearly defined; 4) the exact amount of measures that are authorised to the king must be indicated (Clarenne & Romainville, 2020).

In view of the outlined, it can be concluded that none of the researched national constitutions do not *expressis verbis* regulate the concept of emergency state. However, the Satversme has been recognised as functionable also in the period of an emergency state as it is able to be both flexible and adapt to the current situation using the translation methods of law norms and filling those norms with a certain content. The authors of the comments of the Constitution (*Satversme*), while explaining the institute of special legal regime in Latvia, i.e. a state of exception, has indicated both the principles applicable in this mode and explained the meaning of a state of exception, which the author of the study has also recognised as eligible during the emergency state. It is also necessary to recognise that the Satversme contains an unusual mechanism of restrictions on human rights, which is not commonly used in constitutions, indicating specific restrictive articles in a single provision. In addition, evaluating the institute of emergency state in Latvia, there are considerable arguments and motivations related to Article 117 that was not adopted in the Satversme.

Regarding the Constitution of the French Republic, it can be noted that it gives extreme powers to the President of the Republic, naming the cases in which these powers

can take place; however, it does not regulate the extent of these powers. Consequently, the basic laws of both countries allow existence of emergency state and its possible modifications and derogations from the usual arrangements but does not precisely regulate it. Thus, in accordance with the principle of unity of the Constitution, these two basic laws have to be looked upon in conjunction with all the rules and must be interpreted according to the "spirit" of the age. The fact that the constitutions do not contain a separate legal provision on the announcement of the emergency state does not mean that this issue is not constitutionally amended. In turn, while evaluating the French model of restriction on human rights, it was found that the justification is found in Article 34 of the Constitution, which provides that it is the law that lays down rules in relation to the human civil rights, foundational basic rights and public freedoms. Similarly, restrictions on human rights are based on the norms of the Declaration of the Rights of Man and of the Citizen, and directly, on the Article 4, which sets limitations on the rights of other members of society. On the other hand, the Belgian Constitution indicates that the King has no other powers, except those that are granted by the constitution and the special laws adopted on the basis of the Constitution itself. Similarly, the highest law of this country states that no derogations from it are allowed; consequently, it is not the lack of legislation but the resulting denial of the emergency state that is found. Regarding the model of restrictions on human rights, it can be noted, that there is no general clause of restrictions on human rights included in the constitution, but the mechanism of restrictions on human rights is incorporated in several ways, including the way of specific derogations. For example, Article 22 of the Constitution determines the rights to inviolability of private and family life, except for certain cases defined in the law. Thus, it can be noted that the legislator has directly included the right of derogation in the norm. However, without legal provisions incorporated into national basic laws, specific regulatory enactments are those that are significant in the context of the institute of emergency state.

Meaning of Law on Emergency State in the Legal System

The author of the study has found that the law "On emergency situation and state of exception" was established on the basis of lack of regulation and deficiencies in the Law "On state of exception" which allowed to issue a specific legal regime only in a situation where the country is threatened by the external enemy or when there are domestic civil unrests that threaten the existing national apparatus or there is a danger of such unrests in a country or in a part of it. The author has also found that all the obligations of a state that result from the international law norms are respected in the law. In addition, it has been found that the law is not contrary to international basic documents on human rights. Regarding the content of broadly defined parts of multiple Articles that are contained in the law, such as the second paragraph of Article 8 which includes the rights of the Cabinet of Ministers to determine the competence

of public administration and municipal institutions in prevention and overcoming of the national threat, or, for example, the third paragraph of Article 19 which determines that measures should be taken only to the extent necessary to normalise the situation, noting that the applicable law should be reasonable and able to fulfil the identified open concepts in the Article, such as "normalisation of the situation" by itself (*Par ārkārtējo situāciju un izņēmuma stāvokli: Latvijas Republikas likums*, 2013). In contrast, if the state unreasonably uses extraordinary powers, a greater danger may occur. At the same time, the author has found that the relevant Articles cannot be clarified, as the purpose of the law is essentially to predict the unpredictable. It is also important that all administrative decisions taken in a state of emergency should have a legitimate aim to be proportionate, non-discriminatory, reasonable and necessary in each particular event of a national threat. The current study recognises that, in general, this law is well applicable in an emergency state.

Simultaneously, it can be noted, that the author of the study works in the municipality of Smiltene county, and it is also essential to emphasise the work of municipality during the state of emergency. In this context, it should be pointed out that an important role in the legal framework of the emergency state was played not only by the abovementioned law, but also statement No. 8 of the Nation's President "Basic principles of operation of nation's constitutional organs in an emergency state" of March 23, 2020. According to its second paragraph, all the country's constitutional bodies, all state institutions, incorporations and officials must exercise their competences and carry out their work so that within the framework of this general national aim their functions and tasks were performed as much as possible. Also, paragraph 4 of the message determines, if necessary, the operating forms of constitutional bodies, corporations, institutions and officials are applicable to the circumstances determined by the emergency state. It also includes the mode of remote working, restriction on direct contacts of people, expanding operation in an electronic environment and other measures that ensure the performance of functions as much as possible. Consequently, also the municipality in which the author of the study works has tried to find a wide range of solutions to fulfil its tasks as effectively as possible in an emergency state. For example, since the prevalence of Corona virus, all sites and meetings have been organised remotely on Zoom platform, which has already become such a mundane and convenient "tool" that it has been decided to organise a weekly employee meeting using this platform also in the future, because it has been observed that more employees participate in this meeting format than visiting it in person. This can be explained by the fact that it is easier and faster to connect to the meeting in Zoom, employees can do it from their office (home, park). It is also noticeable that it would be worthwhile to analyse the internal alarm system during the emergency state in public administration institutions, including municipalities, namely, by examining how much and what kind of report was received directly in connection with non-compliance with the government imposed restrictions in the context of the virus Covid-19.

Regarding France – in legal literature, it is recognised that there are several legal regimes in France: extraordinary powers granted to the President in accordance with the Constitution. State of exception associated with inevitable threat that is caused by war or armed rebellion and the emergency state, associated with "health disaster", namely, the situation where health disaster threatens health of the population by its nature and severity. Thus, it is already possible to state that in comparison with the Latvian legal framework, in which two specific legal regimes are possible – the emergency situation and the state of exception, the French national legal system contains three solutions. Those are two laws which govern the emergency state in the country – 1955 Law "On the Emergency state" and the Code of Public Health. It is precisely in the context of the virus Covid-19 pandemic when the legal instrument integrated in the French National Health Code can be praised, according to which the public health emergency state can be announced throughout entire metropolis or some part of it. Such a situation can be announced based on the Decree of the Council of Ministers, adopted in accordance with the Statement of the Minister of Health, and must be accompanied by all existing scientific data that motivate to make such a decision. In this case, both the National Assembly and the Senate must be informed of all the measures taken by the government. In contrast, the extension of the emergency situation after one month here is only possible by law and can only be performed after the opinion of the Scientific Committee has been received.

On the other hand, regarding Belgium, the author has found that one of the resources used by the state to cope with emergency circumstances caused by the virus Covid-19 is the royal decrees adopted by the Council of Ministers. It was previously established that Article 105 of the Constitution states that the King has no other powers, except those that are granted by the Constitution and the specific laws adopted in accordance with the Constitution. Thus, these extraordinary powers are implemented based on regulatory decrees, using which the executive power can intervene in the legislative power. The author of the study has found that they are similar to the legal system of the Republic of Estonia, where, under Article 109 of the Estonian Constitution, President of the Republic is allowed to issue co-signed decrees of the Head of the State Meeting and the Prime Minister that have the power of the law if the State Meeting cannot occur, in case of urgent national necessity. When the State Meeting occurs, the President submits decrees to it, and the State Meeting immediately adopts the law on their approval or cancellation (Pleps, Pastars, & Plakane, 2014). Similarly, in Belgium the King's special or extraordinary powers, which are implemented through the decrees, are exercised only and exclusively due to emergency circumstances when it is not possible to comply with the ordinary legislative procedure, because there is an urgent emergency and the need for such a legislative act.

Thus, two laws were studied both from March 27, 2020, both titled "The law that authorises the King to adopt measures to control the spread of Covid-19 virus" and it was found that they were adopted so Belgium could respond to Covid-19 virus epidemic and manage its consequences, so they determine the Royal Powers to implement the necessary measures with the decree adopted by the Council of Ministers. They indicate that

the King may take all the necessary measures, observing the principles of independence and impartiality, taking into account the rights of participants of the trial of defence during the proceedings and adapt the competence, operation and procedure of national councils and administrative courts, in such a way as to allow the continuity of these institutions and continued implementation of the mission of these institutions. One law requires that the decree is approved by the law within a period of one year, while the second decree requires that the King is authorised to take all the necessary measures to protect public health and to preserve social order, including organising the necessary measures in the field of logistics, to take supportive measures in the financial and economic sectors, supporting businesses and households that have been affected by the consequences of the pandemic, to protect the consumer, make amendments to labour law and social security law, for example, to guarantee the protection of national economic interests and to protect critical industries. Likewise, the King has given rights to extend the terms that are stated in the laws, has an obligation to guarantee the continuity of legal proceedings to adapt the work of bailiffs, prosecutors, translators (interpreters), notaries, so as they could be able to function in emergency circumstances, to observe the common decisions issued by the European Union member states to overcome the crisis.

Conclusions

1. Concepts relating to the institute of emergency state are used incorrectly and there is an unequal terminology practice found. It is not appropriate to use the concept of "emergency state" and "extraordinary state" or other similar derivatives, as the legislator has clearly distinguished and separated between the two legal regimes – emergency situation and state of exception. It is also not correct to use the concept of "martial law" or "war time" because these concepts have a military character. Regarding the concept of "crisis", this concept does not in itself mean an emergency situation, but the consequences of the emergency situation may have become a reason for the crisis of some sector.
2. Latvia, France and Belgium belong to the continental European model and the Romano-Germanic law system, and their national legal systems are based on the principles of Roman law, so they have a similar legal framework basis. However, despite each country having a different legal framework for the state of emergency, there is a consensus observed regarding questions on emergency issues.
3. The content of the emergency state is not expressed in Latvian *Satversme*, but the principles of law that are applicable in emergency state and the rule of law in restrictions on human rights can be read in accordance with Paragraph 116 of Article 62 of the *Satversme*. Based on interpretation methods of legal norms, it is made certain, that constitutionalism of emergency state in Latvia can be translated (interpreted) in accordance with the principle of unity of the *Satversme*.

4. Like in Latvia, also in France, the justice of emergency state does not *expressis verbis* follow from the Constitution, but the President of the Republic must be awarded with an extraordinary authority in the cases specified in the Basic Law. Only in France, three specific legal regimes have been distinguished, including emergency state in the health sector, which demonstrates its functionality during the Covid-19 virus.
5. The Constitution of the Kingdom of Belgium states that there is no possibility of derogation from the provisions of the Constitution, and it does not provide for a mechanism to announce emergency state. The emergency state in the country is rated contradictory and it would be necessary to revise the Belgian Basic Law to adjust the justice of emergency state. It is not stated that there is a separate law that regulates the emergency state, as it is in the legal systems of Latvia and France.
6. It would be worth considering whether it is necessary to amend the *Satversme*, supplementing it with paragraph 1 of Article 62 which would give the rights to the Cabinet of Ministers to announce an emergency state, as well as also to consider the possibility of incorporating into the *Satversme* such an Article which would state that in the period of these two legal regimes, the Cabinet of Ministers has the right to issue rules that have the power of law, with *Saeima* subsequently reviewing them.

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Legal Challenges of Teleworking in Latvia [1]

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Abstract

Due to technological developments and entry of new generations into the labor market, teleworking is rapidly becoming more widely used as a form of employment. The Covid-19 crisis has increased its relevance over the past year. In the Latvian regulatory framework, this has been defined recently, including the definition of telework in the Labour Protection Law. Given that companies have had to adapt to the organisation of telework relatively quickly, in practice there are legal obstacles to effective implementation of sustainable telework.

The aim of the article is to reveal the most significant legal obstacles to implementation of efficient and sustainable telework in Latvia, considering experience of other countries. Both national and international legislation have been used in the study to achieve the set goal. Descriptive, analysis, induction and deduction methods have been used in the development of the article.

The results showed that there are uncertainties about application of the law in Latvia in the context of telework to the employee's right to disconnect from digital

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devices. The authors also found that planned changes to the Labour Law regarding telework do not create legal certainty in employment relations in emergency situations, such as the Covid-19 crisis. The authors also suggest including the right to disconnect in the Latvian regulation, to secure employees' rights to privacy and secure and healthy work environment.

Keywords: Labour Law, teleworking, the right to disconnect.

Introduction

Technological developments and the Covid-19 crisis have highlighted teleworking as a form of employment. In addition, it is the wider use of technology that suggests that teleworking, as a form of employment, is not temporary in nature, but is expected to continue to be used more widely (Belzuneugui-Eraso & Erro-Garces, 2020). The research problem is justified by the topicality of the research. As telework is used more and more widely, in practice only new cases arise in which it is necessary to clarify and apply legal norms in cases that have not been experienced before and which are not directly regulated.

Topicality of telework is confirmed not only by international studies (for example, Eurofond, OECD) and data from the Central Statistical Bureau in Latvia, but also by the project "Life with COVID-19: Assessment of Corona virus Crisis Management in Latvia and Proposals for Future Public Sustainability". The primary data set of the study consisted of three surveys conducted in the second half of 2020 – the Latvian Business Survey, the Population Survey and the Employee Survey. The results of the surveys showed that in practice during the crisis caused by Covid-19 there are violations of Labour Law, which are largely related to organisation of telework and lack of common understanding of application of regulations in various telework cases.

The aim of the article is to reveal the most significant legal obstacles to implementation of efficient and sustainable telework in Latvia, considering the experience of other countries. Both national and international legislation have been used in the study to achieve the set goal. Descriptive, analysis, induction and deduction methods have been used in the development of the article.

In the following chapters, attention is paid to the problem of remote work regulation in Latvia, especially analysing the right to disconnect from digital devices.

Regulation of Telework in Latvia

Topicality of telework now and in the near future is evidenced by the results of the research carried out within the project "Life with COVID-19: Assessment of the Corona virus Crisis in Latvia and Proposals for the Future of Society". Within the framework of the study, companies, employees and the general population were surveyed. The results of the population survey showed that 22% of the respondents worked remotely during

the Covid-19 emergency. Of the respondents who worked remotely, 45.3 % represented the public sector and 26.8 % the private sector. The results of the survey also showed that a large proportion of respondents would like to continue to work remotely entirely or a couple of days a week. Not only did the crisis caused by Covid-19 determine improvement of the regulatory framework in the context of telework, but it is also provided for Improvement Action Plan for 2019–2022 in the Business Environment (Cabinet of Ministers, 2019). This means that as teleworking becomes more widely used, it is important to have a common understanding of application and interpretation of the regulatory framework, which would create legal certainty and security even in exceptional circumstances.

Amendments to the Labour Protection Law of 1 July, 2020 define telework, stipulating that it is a form of work performance where the work that the employee could perform within the employer's company is performed permanently or regularly outside the company, including work performed using information and communication technologies. For the purposes of this law, telework is not considered to be work which, due to its nature, is associated with regular movement. In addition, Article 8 of the Labor Protection Law was supplemented with a clause providing for co-operation between the employer and the employee in assessment of work environment risk (Labour Protection Law, 2001).

Currently in Latvia, the first part of Article 53 of the Labour Law enables the employer and the employee to agree on the place of work. This means that teleworking is possible by agreement between both parties. The employer may enter into such an agreement with employees with whom an employment contract has already been concluded by proposing amendments to the employment contract in accordance with the procedures specified in Article 97 and 98 of the Labour Law. The results of the employee survey show that 76 % of employees who worked remotely did not have such a written agreement.

The legal framework for telework agreements and the right to unilateral action varies from country to country. For example, German and Swiss legislation stipulate that an agreement on telework must be provided for in either employment contract or collective agreement. However, in exceptional cases, such as the Covid-19 pandemic, the employer has the right to unilaterally require the employee to work remotely (Andersen, 2020).

In addition, it should be noted that the general inclusion of the employee's right to work remotely in the Labour Law is currently being discussed in Germany. Perhaps this would be important for people who are unable to work for the company due to a medical condition, such as people with disabilities or pregnant women. Italian legislation on employment law provides for the right of employees to work remotely in the event of an emergency if the employee has a child under the age of 14 who is studying remotely or has another person who is unable to take care of themselves or has a disability. In Portugal, the employee's right to work remotely for a specific group of people was included because of the Covid-19 pandemic. The circle of persons included those with disabilities

or illnesses that may endanger other persons. Inclusion of such a reservation in the regulatory framework contributes to protection of the most vulnerable groups in the field of labor law, while ensuring the continuation of employment.

In Latvia the Labour Law does not regulate telework separately, but amendments to the Labour Law have been proposed, which would supplement Article 76 of the Labour Law with the fourth part in the following wording: "For purposes of this Law, telework is a form of work in which the work which the employee could perform within the enterprise is performed permanently or regularly outside the employer's enterprise, including work performed by the employer. For the purposes of this Law, work which, due to the nature of the work, is connected with the regular movement of an employee shall not be considered telework" (Labour Law, 2021). Thus, both definition of telework and obligation of the employer to cover expenses incurred by the employee in connection with the performance of telework would be provided. Such a definition of telework is also in line with international practice. However, it would also be important to provide for exceptional cases in which it would be possible for the parties to decide on telework alone, in order to ensure equal and fair application of the law.

The results of the study showed that in practice there is uncertainty regarding employers' compensation to employees for expenses that have occurred due to teleworking. Considering the economic benefits of telework, it is necessary to create preconditions for the wider use of telework. It also includes clear and fair distribution of costs of teleworking between the employer and the employee, in order to avoid situations where teleworking is delayed because the employer and the employee cannot rely on clear tax regulation. The results of the Employee Survey show that 42.8 % of the respondents who are employed and worked remotely were not reimbursed for costs (for the Internet, electricity) although they were necessary. This leads to the conclusion that there is a risk of a breach of employment law with regard to fair compensation for the employee's expenses required to perform telework.

On January 1, 2021, amendments to the Personal Income Tax law came into force, which aims to supplement the transitional provisions with items 159, 160, 161, which states the type of expenses related to telework being exempt from taxation. However, the temporary nature of such regulation is not understood, as the amendments apply only to the rear 2021. Telework, as a form of work organisation even after the end of the Covid-19 emergency, is expected to continue to develop and be used more widely, so appropriate changes in the regulatory framework should be sustainable, thus ensuring legal certainty and predictability. Otherwise, a situation arises in which the Labour Law will provide for a general obligation of the employer to cover the employee's costs related to telework, but the application of taxes in this case is only temporary. In order to ensure legal certainty and predictability, changes are required in Article 9 of the Personal Income Tax Law, which provides for the types of non-taxable income.

To promote legal certainty, it is necessary both to amend the regulatory enactments that regulate the employer's compensation for employee expenses related to telework,

and to create common understanding between entrepreneurs and state institutions on interpretation and application of legal norms.

There is also legal uncertainty regarding the right to privacy in the context of teleworking. Entrepreneurship survey data show that 61 % of the companies that have introduced teleworking have increased digitalisation and use of information technology in business. This shows that as the form of teleworking becomes more widely used, so does the use of information technology, which in turn poses risks in a way that is compatible with an employee's right to privacy or rest.

Given that the right to privacy is a fundamental human right, restrictions on employees' rights to privacy must be lawful and proportionate. Protection of personal data in the Member States of the European Union is determined by the General Data Protection Regulation (2016) and in Latvia also by the Law on the Processing of Personal Data (2018). In the field of labour law, there is no separate regulation in Latvia that, for example, prohibits an employer from controlling an employee's behavior on digital devices.

Although preconditions for lawful data processing follow from the General Data Protection Regulation, individual assessment of individual cases may lead to different subjective interpretations, which creates a legal risk for protection of employees' right to privacy in Latvia.

For example, in Germany, the legislation specifically requires the consent of employee representatives for use of software (for example, employee screen control, computer mouse and keyboard management, control of websites visited) that controls teleworkers. On the other hand, Italian and Portuguese legislation prohibits use of such software which controls employees work-related behavior on digital devices, as it disproportionately violates employees' right to privacy. This shows that there are also different interpretations of the right to privacy between the Member States of the European Union in the context of teleworking.

Right to Disconnect from Digital Devices

It is considerably more difficult to establish balance between work and personal life in digital economy. Because the employee is always in contact with not only the employer, but the entire outside world, achievements of international labor regulations to limit working hours are lost (Chudnovskikh, 2019). Technological developments have created a risk for fair use of breaks and rest periods at work, especially in the context of teleworking. In response to the concerns arising from the "always-on" work culture, the concept of the "right to disconnect" has developed, which provides employees with the ability to disconnect from work, and generally from related communication technologies, outside defined working hours. It is in context of telework that employees are most likely to work "hidden" overtime that is not paid for by their employer. The authors note that the results of the survey of employees showed that 69.3 % of the respondents who worked remotely have an important opportunity to disconnect from digital devices

outside working hours (when the assigned tasks have been completed). The need to introduce the "right to disconnect from digital devices" in order to prevent burnout is also highlighted by a study carried out by Eurofond (Eurofond, 2020).

The right to disconnect from digital devices is considered for some as a new aspect of the right to rest periods and limitation of work hours. The Latvian Labour Law does not directly define the right to disconnect from digital devices; however, such rights arise from certain legal norms, for example, provisions of the Labour Law relating to the general rules on rest periods and breaks in work. This right also follows from Article 27 of the Labour Protection Law, which stipulates that the employer is responsible for safety and health of employees. In general, the right to disconnect from digital devices evolves from the right to privacy and autonomy, employees right to safe and healthy work environment and from employees right to leisure and rest period (Secunda, 2019).

Separate legislation on the right to disconnect from digital devices exists in France, Italy and from 2019 also in Spain. The French legislation provides that employers are required to include in the employment contract a reservation concerning use of telecommunications equipment between the employee and the employer (Orstein & Glassberg, 2019). The right to disconnect from digital devices is provided in different ways by companies in France. Some organisations use preventative measures and provide training for employees on working hours, as well as include a reservation in internal regulations that e-mails cannot be sent outside working hours. Some companies have introduced technological solutions that store e-mail sent by an employee in the system and deliver it only on the morning of the working day. Some companies include a ban on sending e-mails at night in collective agreements or employment contracts (Orstein & Glassberg, 2019). On the other hand, the Italian legislation of 2017, which provides for flexible working hours, stipulates that the employer and the employee must provide technological and organisational means that ensure a minimum rest period, including the right to disconnect from digital devices (ITUC, 2021). Spain is currently the most recent country in establishing the employee's right to disconnect to their regulation along with other digital rights. It is interesting to note that in French and Italian regulation there is no direct recognition of employee's right to disconnect as such while Spanish legislation clearly prescribes the existence of the right to digital disconnection of employees.

In 2019, the Luxembourg Supreme Court also recognised the employee's right to disconnect from digital devices; however, certain rights to disconnect from digital devices are not included in the Luxembourg legislation (Castegnaro, 2019). In Spain, the right to disconnect from digital devices outside normal business hours is set out in the Data Security and Digital Act (2018).

Although more and more countries are introducing the right of employees to disconnect from digital devices in their regulatory framework, either by taking legislative approach (France, Italy) or corporate self-regulatory approach (Germany), there is no uniform regulation at the level of the European Union. The right of employees to disconnect from digital devices is implicit in the Working Time Directive 2003/88/EC.

For example, the directive sets minimum daily and weekly rest periods to protect safety and health of workers. Similarly, the right to disconnect from digital devices derives from the 20 principles of the European Pillar of Social Rights, which include the principle of work-life balance (Principle 9) and the principles of a healthy, safe and well-adapted work environment and data protection (European Commission, 2021). This legislation is more of a recommendatory nature, but compliance with it is essential for harmonisation of social rights in the European Union.

It can be concluded that experience of the EU Member States differs regarding the right of employees to disconnect from digital devices. Although such rights also derive from the Latvian regulatory framework, clear regulation would create legal certainty. Considering the topicality of telework, Latvia also needs a regulatory framework that would include the right of employees to disconnect from digital devices, thus promoting sustainability of telework and compliance with international principles. That would also help to protect employee privacy, productivity and compensation, and their rest and leisure time. Notwithstanding, it is worth noting that the right to disconnect can also be secured in a variety of ways, not just through legal means. Modern technology has enabled modern businesses to exercise their right to disconnect through technical means. This suggests that there is a need for social dialogue in Latvia between institutions and businesses to implement the right to disconnect in practice along with changes in regulation.

Conclusions

1. With the development of technology, relevance of telework is expected to increase; therefore, a clear regulatory framework is needed that would create legal certainty on organisation of telework, the right of employees to disconnect from digital devices, and employers' compensation for expenses incurred by employees work.
2. The planned changes to the Labour Law in Latvia regarding telework do not create legal certainty in employment relations in emergency situations, such as the Covid-19 crisis, as they do not provide for a unilateral right to telework in exceptional cases. Such rights would ensure their fair application in exceptional cases.
3. Although the planned amendments to the Labour Law provide for the employer's obligation to reimburse employee expenses incurred in connection with telework, the application of personal income tax in this case is only temporary with a time limit that creates legal uncertainty, as telework is an expected form of employment and will be used more widely in the future.
4. Although preconditions for lawful data processing follow from the General Data Protection Regulation, individual assessment of individual cases may lead to different subjective interpretations, which creates a legal risk for protection of employees' right to privacy in Latvia in the context of telework.

5. The right to disconnect from digital devices is not directly defined in the Latvian Labour Law; however, such rights arise from separate legal norms in both the Labour Law and the Labour Protection Law. However, it would be necessary to improve the understanding of the right of employees to disconnect from digital devices, and considering the ever-increasing use of technology, provide for a separate right to disconnect from digital devices in the regulatory framework.

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International Cooperation Between Ukraine and Latvia in the Area of Justice (Executive Branch of Power)

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Abstract

Implementation of the Association Agreement between Ukraine and the European Union has opened additional opportunities for establishing bilateral cooperation between bodies, institutions and organisations in the field of justice. The article examines the structure and management system of the Ministries of Justice of Ukraine and Latvia. In the course of a detailed analysis of the institutional structure and functional purpose, it was established that the Ministry of Justice of Ukraine and the Ministry of Justice of the Republic of Latvia have similar activities and management systems, typical for many European countries. Ukraine's European integration aspirations, reflected in its commitments under the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other, demonstrate Ukraine's serious intentions to change its approach to justice. It is established that in the direction of the development of cooperation in the field of justice between Ukraine and Latvia fruitful cooperation is established, which is reflected in the Memorandum of Understanding between the Ministry of Justice of Ukraine and the Ministry of Justice of the Republic of Latvia.

Keywords: international cooperation, administrative law, justice, public administration.

Bodies of justice ensure functioning of the main activities of the state, proper level of functioning of which depends on the achievement of strategic goals of the state, in particular, socio-economic, political, international law, as well as the level of quality of life.

Modern processes of reforming the justice sector of Ukraine testify to the need to study and use the positive experience of the functioning of the judiciary in the European Union. The study of certain issues that arise during international cooperation in the field of justice will provide opportunities for the exchange of knowledge and experience in the legal, legislative, organisational and functional areas; which actualises this study. In the context of improving the functioning of the justice sector in Ukraine, it has been proposed to get acquainted with the experience of the Ministry of Justice of the Republic of Latvia, analyse the main activities, management system, tasks of this executive body and the main areas of cooperation between Ukraine and Latvia.

According to Art. 1 of the Association Agreement between Ukraine and the European Union, the European Atomic Energy Community and their Member States, the main objectives of the Association are: 1) to promote gradual rapprochement of the Parties based on common values and close privileged ties , as well as deepen Ukraine's relationship with EU policy and its participation in programmes and agencies; 2) to provide the necessary framework for enhanced of political dialogue in all areas of mutual interest; 3) to strengthen cooperation in the field of justice, freedom and security in order to ensure the rule of law and respect for human rights and fundamental freedoms, etc. (Verkhovna Rada of Ukraine, 16.09.2014).

According to Art. 14, Section III of the Association Agreement in the framework of cooperation in the field of justice, freedom and security, the Parties attach special importance to strengthening the rule of law and strengthening institutions at all levels in the field of governance in general and law enforcement and judicial authorities in particular. Cooperation will focus, in particular, on strengthening the judiciary, increasing its efficiency, guaranteeing its independence and impartiality, and combating corruption. Cooperation in the field of justice, freedom and security will be based on the principle of respect for human rights and fundamental freedoms (Verkhovna Rada of Ukraine, 16.09.2014).

Commitments made under the Association Agreement confirm European integration aspirations of Ukraine to change approaches in various areas, including justice.

The current stage of development of the Ministry of Justice of Ukraine allows identifying it as one of the leading central executive bodies, which has a particularly broad scope of interaction with citizens and the corresponding influence on the formation of state legal policy.

The views of N. A. Zheleznyak have been supported that are in contrast to other ministries, central executive bodies, including law enforcement (Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, tax police, etc.). The Ministry of Justice of Ukraine occupies a special place, performing not narrowly specific (for example, "force") tasks and functions, but large-scale legal measures, which together provide support for the required level of law and order. The author stressed that the Ministry of Justice of Ukraine influences solution of problems in the justice sector and helps to increase the overall level of legal and organisational support for the implementation of

state legal policy aimed at protecting human and civil rights, freedoms in certain areas (Zhelezniak, 2005).

O. G. Predmetnikov, researching administrative and legal framework of the judiciary, noted that today the judiciary of Ukraine continues to be in a transitional stage of its institutionalisation and implementation of European experience in the field of justice and other related fields, in particular, positive trends in the elimination of system of justice bodies of Ukraine of superfluous administrative links, reduction of number of employees, introduction of modern electronic services, and also liberalisation, decentralisation and demonopolisation of the corresponding directions of activity of bodies of justice of Ukraine (Predmestnikov, 2017).

Supporting such approach, the structural transformation of bodies and institutions under the jurisdiction of the Ministry of Justice of Ukraine is important to be performed, more so due to the international experience to apply the best form and management system.

O. Agapova and K. Palkova studying "public administration" in Ukraine and Latvia found that administrative law is an important component of public administration, thus concluding the following: 1) administrative and legal norms are the basis for the emergence of relations in the field of public administration; 2) community relations arising during public administration can be characterised as administrative and legal; 3) activity of subjects of public administration is carried out in appropriate forms of public administration (Agapova, Palkova, 2020).

It has been proposed to consider in excruciating detail the main administrative and legal regulations governing the activities of the Ministries of Justice of both countries.

According to the Resolution of the Cabinet of Ministers of Ukraine dated 02.07.2014 No. 228 "On approval of the Regulations on the Ministry of Justice of Ukraine", the Ministry of Justice of Ukraine ensures formation and implementation of state legal policy, state policy on bankruptcy, notary, enforcement of court decisions and other bodies (officials), state registration of civil status acts, state registration of real rights to immovable property, state registration of print media and news agencies, in the field of execution of criminal penalties and probation, in the field of legal education, etc. (*Postanova Kabinetu Ministriv Ukrainy* (Eng. Resolutions of the Cabinet of Ministers of Ukraine), 02.07.2014).

It should be noted that the listed activities of the Ministry of Justice of Ukraine are typical for many European Ministries of Justice, including the Ministry of Justice of the Republic of Latvia.

According to the Regulations of the Cabinet of Ministers of the Republic of Latvia No. 474 of 16.08.2017 "Regulations on the Ministry of Justice", the Ministry of Justice of the Republic of Latvia is an advanced institution of public administration in the field of justice (legal policy, judicial system and court management) policy (*Ministru kabinets* (Eng. Cabinet of Ministry), 18.08.2017).

The main functions of the Ministry of Justice of the Republic of Latvia can be divided into three groups: 1) development, organisation and coordination of policy in such areas as: judicial system and administration of district (city) courts and district courts; system of criminal and administrative penalties; execution of sentences; forensic examination; openness of information; public registers; systematisation of official publications; protection of personal data; industrial property, in particular patents, trademarks, samples and topographies of semiconductor products; maintaining the state real estate cadastre; insolvency of legal entities (except credit institutions) and individuals; registration of civil status acts; religious affairs; free access to legal professions (services); alternative dispute resolution – arbitration and mediation; providing state-guaranteed content; state legal aid; state compensation to victims; prevention of money laundering and terrorist financing together with the Ministry of Finance in accordance with the established competence, etc.; 2) organisation and coordination of implementation of laws and other regulations; 3) performance of other functions provided by external regulations (*Ministru kabinets* (Eng. Cabinet of Ministers), 18.08.2017).

Effectiveness of practical activities of the bodies belonging to the sphere of management of the Ministry of Justice, first of all, depends on the organised management system, through which the coordination of the activities forms a structure during the implementation of their respective tasks and functions. It should be emphasised that the Ministry of Justice of Ukraine and the Ministry of Justice of Latvia have a similar institutional structure and similar areas of core business.

The analysis of the Ministry of Justice of Latvia has made it possible to single out the bodies, departments and agencies that belong to the management system of this central executive body. The vertical of management of the Ministry of Justice of Latvia consists of the central office, the Secretary of State and its deputies and other bodies that ensure the work of the Ministry (Legal Department, Finance Department, Personnel Management, etc.).

The central office of the Ministry of Justice of Latvia consists directly of the Minister of Justice, parliamentary secretaries, and the administration. The Minister of Justice directly subordinates the State Secretary, who is in charge of: 1) Deputy State Secretary on Legal Policy; 2) Deputy State Secretary on External Cooperation and Strategy of the Ministry of Justice of Latvia; 4) Deputy State Secretary for Justice (*Tieslietu ministrija. Vadība* (Eng. The Ministry of Justice. Officials), 25.02.2020).

The management system of the Ministry of Justice of Ukraine has features that distinguish its central executive body from similar entities in European countries. Thus, it is necessary to single out the following structural units of the Ministry of Justice of Ukraine: 1) central office of the Ministry; 2) territorial bodies (8 interregional departments); 3) institutions and bodies of justice (research institutions of forensic examinations, state notary offices); 4) subordinate institutions and state enterprises (State Enterprise "National Information Systems", Coordination Centre for Legal Aid

Provision, Institute of Law and Postgraduate Education of the Ministry of Justice, etc.); 5) bodies coordinated by the Minister of Justice (State Archival Service of Ukraine); 6) Interdepartmental Coordination Council on Juvenile Justice; 7) Public Council at the Ministry of Justice; 8) Coordination Centre for Legal Aid Provision (*Ministerstva yustytsii Ukrainy* (Eng. Ministry of Justice of Ukraine), 2021b).

The central office of the Ministry of Justice of Ukraine includes management and structural units responsible for various areas of state policy in the field of justice.

The management staff of the Ministry of Justice of Ukraine includes: 1) the Minister; 2) the State Secretary; 3) the First Deputy Minister of Justice of Ukraine; 4) three Deputy Ministers of Justice of Ukraine; 5) Deputy Minister for Enforcement Service, Deputy Minister of Justice of Ukraine for European Integration; 6) Deputy Minister of Justice of Ukraine – Government Commissioner for the European Court of Human Rights; 7) Deputy Minister of Justice of Ukraine for State Registration; 8) Deputy Minister of Justice of Ukraine for Digital Development, Digital Transformations and Digitisation (*Ministerstva yustytsii Ukrainy* (Eng. Ministry of Justice of Ukraine), 2021a).

Comparing management staff of the Ministries of Justice, it can be concluded that the management staff of the Ministry of Justice of Ukraine is represented by a large number of managers who are in charge of various spheres of activity of the Ministry of Justice of Ukraine, in contrast to the management staff of the Latvian Ministry of Justice. It is believed that the measures that were taken to optimize the management of the Ministry of Justice of Latvia have a positive impact on the effectiveness of management in the field of justice in Latvia. Therefore, such practice can be implemented into the management structure of the Ministry of Justice of Ukraine.

Analysing the specifics of the activities and management structure of the Ministries of Justice of both countries, it can be concluded that they have a particularly broad scope of interaction with citizens and the corresponding influence on the formation of legal policy and realisation of state and legal regulation.

Considering the unified approach to the management of justice in both countries, the senior management of the Ministry of Justice of Ukraine and the Ministry of Justice of the Republic of Latvia signed the Memorandum of Understanding (*Ministerstvo yustytsii Ukrainy* (Eng. Ministry of Justice of Ukraine), 2019). This event took place on October 16, 2019 and strengthened the partnership between the central executive bodies (*Tieslietu ministrija* (Ministry of Justice), 2019). The main objectives of the Memorandum, which will be gradually implemented by the Ministries of Justice, are as follows: a) intensification and consolidation of cooperation between the Parties in the areas of rule of law, human rights, access to justice and administration of justice; b) facilitation to the development of joint initiatives and projects under the frame of Eastern Partnership Platform 1 "Democracy, Good Governance and Stability"; c) sharing best practices on the implementation of the Association Agreement and EU legislation, as well as international conventions in the field of justice; d) sharing experience and progress made in the implementation of justice reforms; e) sharing views and consideration of possible solutions for

justice challenges; f) facilitation to sharing of any other information and experience on the issues within the competence of the Parties.

It should also be noted that Latvia and Ukraine have already reached agreement on: ensuring justice and the rule of law; protection of human rights; provision of free legal aid; development of legal awareness and ensuring access to justice; improvement of the penitentiary system and probation; ensuring execution of court decisions; strengthening cooperation in the area of forensic science; implementation of a set of measures designed to prevent and combat corruption, in particular, through ensuring the transparency of beneficial ownership; development of electronic registers and electronic trust services; introduction of innovative technologies such as open data and e-government; development of alternative ways of dispute resolution; establishment of cooperation in other areas of common interest.

To implement these areas of cooperation, corresponding programmes of cooperation in certain areas of activity are being developed. The content of such programmes includes a set of actions, namely: professional meetings, internships and training of experts for experience exchange; organisation of seminars, trainings, study and working trips; professional discussions; consultations of experts in the field of cooperation, organisation of a conference for representatives, etc.

A particularly important area of cooperation within the Memorandum of Understanding between the Ministry of Justice of Ukraine and the Ministry of Justice of the Republic of Latvia is conducting internships for experience exchange among employees who are representatives of the penitentiary sector.

With the organisational support of the NORLAU project, representatives of the Directorate for Strategic Planning and European Integration of the Ministry of Justice of Ukraine and the State Institution "Probation Centre" paid a study visit to the Republic of Latvia for November 25 through November 27 of 2018 to study positive experience in implementing electronic monitoring (Babak, 18.12.2018). The NORLAU probation project is a technical assistance and cooperation project in Ukraine, which is funded by the Norwegian Ministry of Foreign Affairs and realised by the Norwegian executive power. Norwegian Rule of Law Advisory Team in Ukraine has been working since 2018 under the supervision of the Directorate of the Norwegian Correctional Service (KDI). In its work, NORLAU directly supports the State Institution "Probation Centre" of Ukraine and facilitates its development in accordance with international standards and best practices in the field of probation (Gromadskii prostir, n.d.).

The issues of establishing cooperation in the field of probation were also discussed during the working trip of the leadership of the Ministry of Justice of Ukraine to the Ministry of Justice of Latvia with the support of the NORLAU project in 2019 (*Tieslietu ministrija* (Eng. Ministry of Justice), 2019b).

It should be stated that international technical assistance projects play an important role in implementing provisions of the Memorandum of Understanding between the Ministry of Justice of Ukraine and the Ministry of Justice of the Republic of Latvia.

Conclusions

Considering the best practices of EU member states serves as a step-by-step guide for system reforms in the field of justice in Ukraine. Strengthening of interstate cooperation in such areas as: justice and the rule of law; protection of human rights; free legal aid; legal awareness and access to justice; penitentiary system and probation; execution of court decisions; forensic examination; prevention and fight against corruption, etc., allows to get acquainted with the functioning of particular bodies and institutions and develop specific proposals for improving the activities of the judiciary in Ukraine.

The analysis of the Ministries of Justice of Ukraine and Latvia was based on a unique approach (legal regulation, institutional structure and management system, forms of international cooperation and projects), which allowed to identify the main forms of international cooperation and draw specific conclusions.

First, commitments made under the Association Agreement between Ukraine, as the first Party, and the European Union, the European Atomic Energy Community and their member states, as the second Party, confirm Ukraine's intentions of European integration kind to change its approach to justice.

Second, it is established that the Ministry of Justice of Ukraine and the Ministry of Justice of the Republic of Latvia have a similar institutional structure and similar areas of main activities, which are typical for many European Ministries of Justice.

Third, emphasis is put on existence of a unified approach in the administration of justice in both countries.

Fourth, it is noted that the Memorandum of Understanding between the Ministry of Justice of Ukraine and the Ministry of Justice of the Republic of Latvia plays an important role in development of Ukrainian-Latvian relations and positively affects the implementation of positive experience gained over the course of realisation of the corresponding Ukrainian-Latvian cooperation programs.

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Problems of Recognition of Foreign Judgments and *res judicata* in European Union

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Abstract

The article examines the problematic aspects of recognition and enforcement of foreign judgments in the European Union in relation to the application of the public policy clause. Analysis of the content of public order also constitutes part of the article. It focuses on the EU law instruments which provide unequal conditions for non-recognition of foreign judgments. The authors discuss if inclusion in the CJEU of the limits on the interpretation of the public order clause is a sufficient guarantee to ensure proper application of the public order clause. Moreover, the authors analyse the principle of *res judicata* according the EU law.

Keywords: recognition of foreign judgments, public order, *res judicata*, European Union law.

Free Movement of Judgments and Public Order Exception

The growing number of disputes with an international dimension causes a need in the European Union (thereinafter – EU) to ensure an effective protection of the civil rights. One of the preconditions for achieving this goal is simplification of the enforcement of judgments of the courts of the Member States of the EU in civil matters throughout the Union. To achieve this goal, the EU legislation in civil (commercial) cases has abolished exequatur (the requirement to recognise a judgment before it is enforced) and enshrined the principle of free movement of judgments.

The exercise of the right to a judicial remedy is not limited to adoption of a judgment as a single final act on the substance of the dispute. Implementation of the right to judicial protection and effective protection of subjective rights of persons or interests protected by law depend on enforcement of court decisions (Tamošiūnienė, 2007). In 1997, the European Court of Human Rights (thereinafter – ECHR) ruled in case *Hornsby vs Greece* that a judgment given by any court must be enforced and that enforcement proceedings must therefore be regarded as an integral part of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). In the context of the objectives of Article 6 of the Convention, if domestic law did not ensure the enforcement of court decisions, then the right to a fair trial would be illusory [4].

Judicial cooperation developed by the EU in civil matters is based on the principle of mutual recognition of judicial and extrajudicial decisions[1]. The first ideas of the free movement of judgments in the EU can be traced back to the treaty establishing the European Economic Community (also known as the Treaty of Rome)[2].

For implementation of Article 220 of the Treaty of Rome on simplification of formalities for recognition and enforcement of judgments and arbitration awards between Member States, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was adopted[3]. Article 26 (1) of that convention provided that a judgment given in a Contracting State is to be recognised in other Contracting States without any special procedure being required, but such judgment is to be enforced only at the request of the person concerned.

Although effective implementation of the principle of free movement of judgments has been identified as one of the basic preconditions for the creation of a common and efficient market since establishment of the European Economic Community, Article 27 of the Brussels Convention provided exceptions of this principle. One of the exceptions provided for in that convention was the ground for refusal to recognise a judgment given in a Member State if such recognition would be contrary to public policy in the Contracting State in which recognition is sought[4].

It is generally accepted that a court decision is one of the expressions of the state power. Therefore, its power is normally limited to the territory of the State in which the decision was rendered (Rijavec et al., 2018). However, the socio-economic situation obliges states to respect foreign judgments, but even in the twenty-first century the enforcement of a foreign judgment is still considered an interference with the sovereignty of another state (Rijavec et al., 2018, Jokubauskas et al., 2020). Moreover, the exception of

[1] Article 81 of the Treaty on European Union, OJ C 202, 2016, 13–46.

[2] Article 220 of the Treaty of Rome provides that Member States will, where necessary, negotiate among themselves in the interests of their nationals with a view to simplifying formalities for mutual recognition and enforcement of judgments and arbitration awards.

[3] Preamble to the Brussels Convention (1968).

[4] Article 27 (1) of the Brussels Convention (1968).

public order seeks to ensure protection of state sovereignty and constitutional order of each state. However, at both theoretical and practical levels, application of this clause to this day raises various issues.

Historically, a number of doubts have been expressed about this clause during the discussion of the draft Brussels Convention. It has been criticised as being contrary to the principle of free movement of judgments within the European Economic Community (Kaye, 1987). Critics feared that it would allow states to abuse its application, thus defeating the main aim of the convention, which was to create a European market based on mutual trust between Member States (Minehan, 1996). However, proponents of this clause considered these fears exaggerated and unfounded due to the limited practical application of this clause (Minehan, 1996).

Despite criticisms mentioned, public order has remained a condition for non-recognition of judgments in modern European Union law on the recognition and enforcement of judgments in civil matters. For example, Article 45 (1) (a) of the Brussels Ia Regulation provides that at the request of any interested party, a judgment shall not be recognised if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed. An essentially analogous public policy clause is contained in Article 22 (a) of the Brussels IIa Regulation, Article 40 (a) of the Succession Regulation, Article 24 (a) of the Maintenance Regulation and Article 34 (2) of the European Account Preservation Procedure Regulation.

However, Article 23 (a) of the Brussels IIa Regulation provides that a judgment relating to parental responsibility shall not be recognised if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought considering the best interests of the child. In assessing this provision of this regulation, the question arises as to how the balance between public policy and the best interests of the child should be reconciled; where the balance between these two interests lies.

The ECHR in case *Karrer vs Romania* found that in the sensitive area of family relations, the State is not only bound to refrain from taking measures which would hinder the effective enjoyment of family life, but, depending on the circumstances of each case, should take positive action in order to ensure the effective exercise of such rights [5]. In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order was struck within the margin of appreciation afforded to States in such matters, bearing in mind, however, that the child's best interests must be the primary consideration [3].

The public policy clause is also enshrined in Article 33 of the Insolvency Regulation, according to which any Member State may refuse to recognise insolvency proceedings instituted in another Member State or to enforce a judgment given in such proceedings if such recognition or enforcement would be manifestly contrary to public policy, in particular its fundamental principles, or constitutional rights and freedoms of the individual. Unlike other regulations mentioned above, the public policy clause is the only ground for non-recognition of judgments in insolvency proceedings.

The application of this clause in the Insolvency Regulation is linked to a *manifest* breach of public policy. Taking into account that the public order clause is the only non-recognition clause in the Insolvency Regulation, the authors consider that the requested state may refuse to recognise a decision that is manifestly contrary to public policy, especially when its effect is to restrict fundamental rights and freedoms, or on the grounds of public policy where the principles of due process have been breached (for example, breach of defense rights and the principle of *audi alteram partem*; impartiality of the court).

It should be noted that not all EU legislative initiatives in civil matters include a public order as non-recognition and non-enforcement clause. Such legislation includes the European Order for Payment Regulation and the Small Claims Procedure Regulation. Both of these EU regulations govern summary civil proceedings, and the aim of these initiatives is to speed up recovery of outstanding debts in the EU.

The question therefore arises as to whether the public policy clause on recognition and enforcement of judgments is losing its meaning and the Member States are moving towards full mutual trust. On the contrary, the question is whether this indicates a different level of mutual trust between Member States in certain areas. In the opinion of authors, absence of a public order clause in these regulations could have been due to two aspects. First, for example, the European Account Preservation Order establishes a procedural instrument to enforce a future decision. Secondly, the Small Claims Procedure Regulation introduces a simplified procedure for the recovery of debts up to EUR 5000. Such a limited nature of the application of that regulation may have undermined the confidence of the Member States in the area.

Interpretation and Application of the Public Order Clause

The public policy clause undoubtedly concerns the fundamental rights and freedoms of the European Union, as well as economic relations. According to the European Commission, rapid debt recovery is essential for economic operators in the European Union and for proper functioning of the internal market[5]. Since the application of the public policy clause directly determines enforcement of a judgment given in another Member State, its autonomous application and interpretation in the Member States also affects proper functioning of the internal market of the European Union.

Public policy is one of the grounds for non-recognition of a foreign judgment, which must be interpreted narrowly. Such an interpretation of public order determines that although the decision of a foreign court does not comply with the legal regulation of the Republic of Lithuania, it is not a ground for applying this clause in itself (Kirkutis et al., 2020).

[5] See https://ec.europa.eu/commission/presscorner/detail/en/PRES_05_296.

Although the public order clause has been laid down in various legislations of the European Union, the concept of this clause and its content are not disclosed in any of them. The question of the content of public order was first referred to the Court of Justice of the European Union (CJEU) in 1974 in *Yvonne Van Duyn vs Home Office*, where the Court took the traditional view that public policy is a national concept (i.e. the specific public policy of each Member State), which may change over time [2]. The CJEU has held a broadly similar position in subsequent cases; however, in subsequent case law has narrowed autonomy of Member States in interpreting and applying the public policy clause, stating that Member States are free to determine the content of the concept of public policy [1].

Thus, the abstract and unclear content and concept of the public policy clause raises problematic issues at both practical and doctrinal levels regarding proper implementation of this clause, compatibility with the principle of free movement of decisions in the European Union, and protection of state sovereignty and constitutional order.

Recognition of a foreign judgment is a judicial process in which provisions of the Convention shall also apply. Although the Convention does not establish specific criteria and requirements for recognition of foreign judgments, guidelines on application of certain public policy clauses are set out in the case law of the ECHR. For example, in case *Négrépontis-Giannisis vs Greece*, the court recognised the obligation to recognise a foreign judgment (family law) in accordance with Article 6 (1) of the Convention. This case concerned an illegal refusal by the Greek authorities to recognise a foreign judgment, provided that in order to recognise and enforce a foreign judgment under the Greek law several conditions had to be laid down. One of these conditions was that a foreigner judgment cannot infringe Greek public order. The ECHR ruled that the concept of public policy cannot be interpreted unlawfully and disproportionately (fr. *manière arbitration and disproportion*) [6]. Thus, the application of a public order clause cannot be disproportionate and infringe the right of individuals to recognise a foreign judgment.

Lithuanian case law recognises that a provision of public order may be invoked when recognition or enforcement of a foreign judgment in the Republic of Lithuania is incompatible with its legal system and contrary to fundamental principles of law. In such cases, the risk must arise from manifest infringement of a rule of law which is considered to be fundamental in the legal system of the state in which the recognition and enforcement of the foreign judgment is questioned or which is considered to be fundamental in that legal system [12]. The term "public order" shall be construed as including international public policy, which includes fundamental principles of due process as well as mandatory rules of law which establish fundamental and universally recognised principles of law [13].

As a result, not every objection (even to mandatory legal norms of the Republic of Lithuania) may be a sufficient ground for non-recognition of a foreign court decision. Cases where it is established that recognition and enforcement of a judgment of a foreign state would be in conflict with the basic principles of law and moral norms established at

the international level established by the Constitution of the Republic of Lithuania shall be recognised as a violation of public order [14]. The purpose of public order is to protect the basic, fundamental interests of the state and society, i.e., the concept of public policy includes the basic principles on which the legal system of the state, the functioning of the state and society are based [15].

At doctrinal and international levels, distinction is made between procedural and material public order. The latter is rarely applied in practice because of the clear prohibition in the EU law governing the recognition and enforcement of judgments on reviewing the correct application and interpretation of the law by a court of another Member State and on the merits of the substance of the dispute. Thus, the fact that a national court deciding on the non-recognition of a judgment has applied a different rule of law or resolved a dispute between individuals in a different way is not a sufficient ground for not recognising a judgment given in another Member State. The fundamental problem with the substantive public policy clause, however, is its relationship to morality. It is generally argued that fundamental principles of morality can be attributed to a substantive public policy clause; however, the content of public order, and morality in particular, is so vague and varied that their application requires special attention. Unjustified refusal to recognise a judgment given in another Member State may undermine protection of the individual right of such a person and the effectiveness of the right to a fair trial. Also, unreasonable refusal of a person's request to refuse to recognise and enforce such a decision may deny sovereignty of the state recognising the decision, the constitutional order or the moral norms recognised and respected in that society.

On the other hand, giving national courts the power to interpret the content of public policy exclusively could, in principle, jeopardize one of the European Union key objectives of creating a European market based on mutual trust between Member States and simplifying recognition and enforcement of foreign judgments by abolishing formalities and ensuring their free movement. Therefore, although discretion to interpret the concept of public policy is vested in the courts of the Member States, i. e. Member States are free to determine the content of the concept of public policy, interpretation of the limits of this concept is a matter for the CJEU. By refusing to recognise and enforce a judgment given in another Member State, national courts are free to identify the rules which are to be regarded as part of public policy in a given Member State, but whether those rules are in fact equivalent to public policy (where a reference is made by a national court), decided by the CJEU.

However, the authors discuss whether inclusion in the CJEU of the limits on the interpretation of the public order clause is a sufficient guarantee to ensure proper application of the public order clause, given that obligation to refer a question to the CJEU is limited to the court seized. Flexibility and uncertainty of the public policy clause raises the issue of ensuring uniform interpretation and application of the clause, as the EU law rules (other than a reference to the CJEU by a court of origin) do not provide for other measures to ensure effective exercise of their right to a fair trial.

Res judicata Principle in EU

The principle of *res judicata* means that an adjudicated issue cannot be re-litigated (Minssen and Groussot, 2007). The effect of applying the principle of *res judicata* is manifested in two aspects: the negative and the positive. The negative effect of the principle of *res judicata* is that the parties cannot re-bring an identical action (*non bis in idem*), while the positive effect of the principle of *res judicata* is that the judgment can be used as a basis for a claim in another civil case, i.e., the judgment acquires a preliminary ruling and the findings of fact cannot be challenged by the parties in other cases (Mikelėnas, 1997).

The EU principle of *res judicata*, which is applied directly in a domestic court of a member state when dealing with a dispute falling within the scope of EU law, has a number of strands. One is known as relative *res judicata* and is applied where a second action is brought between the same parties, dealing with the same subject matter and based on the same grounds as an earlier action. However, this case concerns a distinct strand known as absolute *res judicata* or, to use its full Latin tag, *res judicata erga omnes*. This is intended to convey that, where the principle applies, a judicial decision is given dispositive effect which is binding not simply on the parties to the decision but on everyone.

Analysing the effects of *res judicata*, it is important to consider one CJEU case dealing with the question whether a court in the Member State addressed is bound by the circumstances of a foreign judgment where the court of origin refused to hear a dispute under an agreement conferring jurisdiction. The Court stated in case *Gothaer Allgemeine Versicherung AG* that since a court of the Member State of origin had recognised the validity of such a jurisdiction clause in reviewing its jurisdiction, it would be contrary to the principle of mutual trust in administration of justice in the European Union of the court of requested Member State. The Court also noted that a judgment of a court of a Member State, declaring that it has no jurisdiction on the ground that the clause is valid, is binding on the courts of other Member States as regards the conclusion reached in the operative part of the judgment. Lack of jurisdiction of that court and the conclusion as to the validity of that condition are the grounds of that judgment, which are necessary for adoption of the operative part of the judgment. In such circumstances, it is recognised that the court seized a judgment in which a court of another Member State has declared that it has no jurisdiction to rule on the substance of the dispute and is bound by the statement of reasons in the judgment declaring the action inadmissible on the validity of that condition.

Thus, discussing recognition and enforcement of foreign judgments, the question arises whether the judgment of a Member State, refusing to recognize a judgment given in another Member State in a decision on procedural irregularities in proceedings in the State of origin, has the *res judicata* effect in another Member State.

In the perspective of the current research, judgment of a court of a Member State refusing to recognise a judgment given in another Member State by a court of another Member State *per se* shall not have the force of *res judicata* in another Member State. This

conclusion must be drawn in the light of possible differences in public policy between the Member States. However, a court of another Member State should consider infringements found in another Member State by the court of the State of origin and assess whether such an infringement is contrary to public policy in that Member State.

Conclusions

Application of a public policy clause in the European Union law in civil matters is not uniform. Interpretation and application of the public policy clause is also left to the courts of the Member States, but this does not guarantee uniform implementation of the principle of free movement of judgments in the EU.

A judgment of a court of a Member State refusing to recognise a judgment given in another Member State by a court of another Member State *per se* shall not have the force of *res judicata* in another Member State due to differences of public order among the Member States. However, infringements found by one Member State court should be considered by another Member State, evaluating it according to the public order of the respective Member State.

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PSD1 from Perspective of ECJ

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Abstract

Directive 2007/64/EC (known also as Payment Service Directive 1 – PSD1) and Directive (EU) 2015/2366 (known also as Payment Service Directive 2 – PSD2) both regulate payment services in the EU. PSD1 is no longer in force and it was replaced with PSD2 that provides the basis for a better integrated EU payments market, opens up a market for new types of payment services, allows to use new technologies to provide these services etc.

The European Court of Justice (ECJ) has made some significant rulings that helped to understand some concepts from the PSD1 and PSD2 more clearly.

In this article, the author gives reviews of the rulings of the ECJ that are related to payment services, PSD1 and gives her own opinion on the possible impact of the respective rulings.

The article was based on methods of general scientific research and interpretation of legal norms and analysis of the case-law of the ECJ. The aim of this article is to review some of the ECJ judgments related to payment services and PSD1.

Keywords: ECJ, Payment Services, Payment Service Directive, PSD1, PSD2.

Introduction

On 24 September 2020, the Commission adopted a retail payments strategy for the EU that aims to further develop the European payments market so Europe can fully reap the benefits of innovation and opportunities that come with digitalisation. The strategy focuses on creating conditions that make it possible to develop instant payments and EU-wide payment solutions that are cost effective and accessible to individuals and businesses across Europe. At the same time, consumer protection is at the heart of the Commission's strategy in order to create safe payment solutions where risks are monitored and mitigated effectively. By developing EU-wide payment

solutions, the Commission also wishes to lessen Europe's dependency on big global players (European Commission, n.d.).

The mentioned Retail Payment Strategy proves once again that the development of payment services is important EU-wide. Development of payment services brings and will bring many benefits such as instant payment, greater competition and most likely lower prices of payment services. The evolution of payment services will also bring more security for both payment service providers and customers. It means understanding of payment services including the ECJ rulings that explain the payment service-related concepts is also very important for future development from the legal point of view.

Payment services were regulated by PSD1 and currently are regulated by PSD2. There are multiple reasons to replace PSD1 with PSD2. Such as rapid growth of new technological solutions, development of new payment services that were not regulated by PSD1 and the need to guarantee fair competition in that market etc.

PSD1[1] and PSD2[2] are maximum or full harmonisation directives which means that the EU countries may not introduce rules that are stricter than those set in the directive (Summary, n.d.). However, the ECJ rulings show some difficulties in understanding of some concepts related to payment services. Even though there are some discussions whether judgments of the ECJ are binding to national courts (Slaņķe, 2013), the author follows the idea that the judgments are binding to national courts despite that not being *expresis verbis* written in the EU legislation.

Considering the above, it is important to review and analyse judgments of the ECJ that apply to payment services in the EU because it has an influence on the national legislation and also the way how national laws are applied and whether PSD1 and PSD2 are implemented correctly. This article aims to review judgments related payment services and discuss some of these judgments.

The author used case law database InfoCuria[3] to look for judgments with the search texts "2007/64/EC" (36 cases found). The found judgments have been divided in three groups: 1) cases where searched words are used as reference; 2) information not available; 3) useful judgments. As in some judgments the search texts were used as references without deeper consideration, only "useful judgments" will be reviewed in this article.

This article will cover those judgments that explain concepts related to PSD1 more clearly. Due to the limited length of the article judgments related to PSD2 have been excluded. The author also does not analyse other case-related documents such as opinions of the advocate general.

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[1] See Article 86 of PSD1.

[2] See Article 107 of PSD2.

[3] Database InfoCuria. https://curia.europa.eu/juris/recherche.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=6482672

"2007/64/EC" in the ECJ judgments

Out of 36 judgments, the author finds 9 judgments as "useful judgments". As mentioned before, not all judgments could be considered a valuable case law. However, in this article the author will review only six important judgments related to PSD1. The article aims to give a short description of the case facts and valuable court findings; the author will also share personal comments.

Case C616/11, T-Mobile Austria GmbH *vs* Verein für Konsumenteninformation

The case is regarded to be the first judgment when PSD1 is considered in the ECJ, which has given an insight into the ECJ's approach concerning payment services; in some source the approach is described as "bullish" (Graham, 2014).

T-Mobile Austria is a telecommunication service provider. It charged an additional monthly fee of EUR 3 to consumers subscribed to the 'Call Europe' tariff who opted for payment other than by direct debit or credit card, which include, in particular, payment through online banking or by means of a paper transfer order.

The Oberster Gerichtshof (Supreme Court) referred the following question to the ECJ for preliminary ruling:

> "Is a transfer order form signed by the payer in person and/or the procedure for ordering transfers based on a signed transfer order form and the agreed procedure for ordering transfers through online banking (telebanking) to be regarded as "payment instruments" within the meaning of Article 4.23 and Article 52(3) of Directive [2007/64]?"

The ECJ paraphrased the question in the following way:

> "[..] the referring court asks, in essence, whether Article 4.23 of Directive 2007/64 must be interpreted as meaning that, first, a transfer order form signed by the payer in person and/or the procedure for ordering transfers based on a signed transfer order form and, second, the procedure for ordering transfers through online banking constitute payment instruments within the meaning of that provision" (Court of Justice of the European Union (Fifth Chamber), Case C-161/11, 09.04.2014).

The ECJ provided the following response:

> "the answer is that Article 4.23 of Directive 2007/64 must be interpreted as meaning that both the procedure for ordering transfers by means of a transfer order form signed by the payer in person and the procedure for ordering transfers through online banking constitute payment instruments within the meaning of that provision" (Court of Justice of the European Union (Fifth Chamber), Case C-161/11, 2014).

PSD1 defines payment instrument as "any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order" (Directive 2007/64/EC, 2007). According to the ECJ judgment signature and procedure for

ordering transfers through online banking, it must be considered as a "procedure" that is a payment instrument. It means that from the perspective of the ECJ, payment instrument as the procedure can include such components as signature of a person and ordering transfers online. The key point is whether consecutive actions allow payment service users to initiate a payment order and if a payment service user can initiate a payment order; it is highly likely that the whole process could be considered as a payment instrument.

Case C375/15, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG *vs* Verein für Konsumenteninformation

BAWAG is a bank operating throughout Austria. In its relations with consumers, it uses standard terms and conditions governing the consumers' use of the online banking website *e-banking*. Standard terms and conditions relating to the online banking website *e-banking* contain a term stating that

> "notices and statements (in particular account information, account statements, credit card statements, notices of changes, etc.) which the bank has to transmit to the customer or make available to him shall, where a customer has agreed to e-banking, be received by them by post or electronically by making them retrievable or transmitting them by means of [BAWAG] e-banking" (Court of Justice of the European Union (Third Chamber), Case-375/15, 2017).

Directive 2007/64/EC requires that at any time during contractual relationship the payment service user shall have a right to receive, on request, contractual terms of the framework contract as well as the information and conditions specified in Article 42 on paper or on another durable medium (Directive 2007/64/EC, Case-375/15, 2007).

In the respective case, the question to the Court of Justice for preliminary ruling was whether Article 41(1) is in conjunction with Article 36(1) of Directive 2007/64 to be interpreted as meaning that information (in electronic format) transmitted by the bank to the electronic mailbox of the customer, as part of online banking website *e-banking* so that the customer can retrieve this information by clicking on it after logging into the online banking website *e-banking*, has been provided on a durable medium (Directive 2007/64/EC, Case-375/15, 2007).

The ECJ responded that Articles 41(1) and 44(1) of Directive 2007/64, read in conjunction with Article 4(25) of that directive, must be interpreted as meaning that changes to the information and conditions, provided for under Article 42 of that directive, and the changes to the framework contract as well, which are transmitted by the payment service provider to the user of those services through the electronic mailbox of an online internet banking website, may not be considered to have been provided on a durable medium within the meaning of those provisions unless these two conditions are met:

1) the website allows the user to store information addressed to them personally in such a way that they may access it and reproduce it unchanged for an adequate period, without any unilateral alteration of its content by that service provider or by another professional being possible;
2) if the payment service user is obliged to consult the website in order to become aware of the information, transmission of that information must be accompanied by active behaviour on the part of the provider aimed at drawing the user's attention to the existence and availability of that information on that website.

In the event of the payment service user being obliged to consult such a website in order to become aware of the relevant information, that information is merely made available to that user within the meaning of the first sentence of Article 36(1) of Directive 2007/64, when transmission of that information is not accompanied by active behaviour on the part of the payment service provider (Court of Justice of the European Union (Third Chamber), 2017).

From the relevant judgment, it can be concluded that it does not matter who the holder of the durable medium is and it can be held also by the payment service provider. However, the durable medium must be compliant with multiple requirements:

1) the website allows to store information that is personally addressed to the user;
2) the user can access the information and reproduce it unchanged for an adequate period;
3) the information cannot be unilaterally changed by the payment service provider or another professional;
4) if the website holder is the payment service provider and the payment service user is obliged to get acquainted with the information on the website, the payment service provider is obliged to actively draw the user's attention that the information is available on the website.

The judgment reveals that the court with its response exposes to many widely interpretable concepts such as "adequate period" and "another professional".

The concept of "adequate period" is not used in the directive 2007/64/EC. From the author's perspective, "adequate period" of storing information related to payment services must be at least the period when the customer receives the payment service. "Adequate period" should be the period when the payment service user can raise a claim against the payment service provider. And "adequate period" must be compliant with the national legislation of the period to collect the information that is related to payment services.

From the judgment, it is not clear who "another professional" is as the directive 2007/64/EC does not use such concept. The author considers that "another professional" might be the third party that has an agreement with a payment service provider related to the website where the information is stored, somebody having legal rights to access the information and change it. Therefore, in case the payment service provider uses the service of "another professional" to provide the website that is considered a durable medium, the payment service provider must be sure that "another professional" does not change the stored information.

The obligation made to the service provider to "provide information" is to be distinguished from the situation where the PSD simply requires having the information "made available" to the customer (e.g. regarding executed payment transactions). In the latter case, the customer shall take active steps to obtain the information (such as actively consulting its e-banking mailbox). In such situation, the service provider is not required to take additional steps (Di Lorenzo, 2017).

A durable medium could be considered paper, USB stick, CD-ROMs, DVDs, memory cards, hard disks of computers and e-mails (Schulze, 2020). In the future other technical solutions such as blockchain could also be considered a durable medium (IBM, n.d.).

Case C-568/16, Faiz Rasool other party Rasool Entertainment GmbH

The request has been made in criminal proceedings against Mr Faiz Rasool, in his capacity as the manager of Rasool Entertainment GmbH (RE), for installing multifunctional terminals enabling cash withdrawals in gaming arcades operated by the company, without being authorised to provide payment services under the German legislation transposing Directive 2007/64 (Court of Justice of the European Union (Fifth Chamber), Case C-568/16, 2018).

The ECJ was prompted with the following question whether Article 4(3) of Directive 2007/64, read in conjunction with point 2 of the annex to the directive, must be interpreted as meaning that a cash withdrawal service offered by a gaming arcade operator to his customers by means of multifunctional terminals in those arcades is a "payment service" within the meaning of that directive, where the operator provides the service free of charge, they do not carry out any operation on those customers' payment accounts, and the activities they perform on that occasion are confined to making the terminals available and loading them with cash (Court of Justice of the European Union (Fifth Chamber), Case C-568/16, 2018).

The ECJ's response reads: "Article 4(3) of Directive 2007/64/EC, read in conjunction with point 2 of the annex to the directive, must be interpreted as meaning that a cash withdrawal service offered by a gaming arcade operator to his customers by means of multifunctional terminals in those arcades is not a 'payment service' within the meaning of that directive, where the operator does not carry out any operation on those customers' payment accounts and the activities he performs on that occasion are confined to making the terminals available and loading them with cash" (Court of Justice of the European Union (Fifth Chamber), Case C-568/16, 2018).

The ECJ base their judgment on the fact that "the operator does not carry out any operation on those customers' payment accounts". Currently, PSD2 considers "account information service" also as a payment service where the payment service provider does not carry out an operation with the money of the payment service receiver but

only with the data related to the account. Therefore, following the current legislation, it should be clarified that "carrying out any operation on the customers' payment accounts" includes also acquiring information from the account. However, if a person only makes terminal available and loads it with cash, it still should not be considered as a payment service.

C191/17, Bundeskammer für Arbeiter und Angestellte (Austria) *vs* ING-DiBa Direktbank Austria Niederlassung der ING-DiBa AG

ING-DiBa Direktbank Austria offers online savings accounts from which its customers can make payments and withdrawals by way of telebanking. Those transfers must always be made through reference accounts opened on behalf of those clients. Those reference accounts are current accounts that those clients may also hold in a bank other than ING-DiBa Direktbank Austria. The referring court states that transfers made from or to online savings accounts do not involve the use of a payment service provider. The referring court states, inter alia, that the mere designation by the term "savings account" does not make it possible to exclude such an account from the scope of the Payment Services Directive. However, it wonders whether, given their purpose, namely savings deposits, online savings accounts may be considered as being used to carry out payment transactions (Court of Justice of the European Union (Fifth Chamber), Case-191/17, 2018).

By its question, the referring court asks, in essence, whether Article 4(14) of the Payment Services Directive must be interpreted as meaning that a savings account which allows for sums deposited without notice and from which payment and withdrawal transactions may be made solely by way of a current account, called a "reference account", comes within the concept of "payment account" (Court of Justice of the European Union (Fifth Chamber), Case-191/17, 2018).

The ECJ responds to the question:

> "Article 4(14) of Directive 2007/64/EC must be interpreted as meaning that a savings account which allows for sums deposited without notice and from which payment and withdrawal transactions may be made solely by means of a current account does not come within the concept of 'payment account'. In the judgment, the court also expresses that savings accounts do not, in principle, fall within the definition of the concept of 'payment account', such an exclusion is not absolute. It follows, in fact, from recital 12, first, that the mere name of an account as a 'savings account' is not sufficient in itself to exclude the categorisation of 'payment account' and, second, that the determining criterion for the purposes of that categorisation lies in the ability to perform daily payment transactions from such an account. In that respect, it is important to take account of Article 1(6) of the Payment Accounts Directive, which provides that it applies to payment accounts through which consumers are able at least to place funds in a payment account, withdraw cash from a payment account, and execute and receive payment transactions, including credit transfers, to and from the third party." (Court of Justice of the European Union (Fifth Chamber), 04.10.2018)

From the judgment it can be seen that the substance of payment account is taken from Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (hereinafter – The Payment Account Directive).

Although the Payment Account Directive is not directly applicable to disputes in the main proceedings, recital 12 thereof states that it is to apply to all payment service providers, as defined in the Payment Services Directive. It is also set out in recital 14 of the Payment Accounts Directive that definitions contained in that directive had to be aligned as far as possible with those contained in other Union legislative acts, and in particular with those contained in the Payment Services Directive. Regarding the concept of "payment account", it must be pointed out that the definition provided for in Article 2(3) of the Payment Accounts Directive is almost identical to that set out in Article 4(14) of the Payment Services Directive. As the Advocate General stated in point 54 of his Opinion, the only difference that the term "consumer" used in the first of those definitions is replaced by the expression "user of payment services" in the second of the definitions, does not reflect a substantial difference in the definition of that concept but rather a difference of purpose between the two directives concerned (Court of Justice of the European Union (Fifth Chamber), 04.10.2018).

Thus, to classify an account as a payment account, the account must have the following functionalities: consumers are able

1) to at least place funds in a payment account;
2) to withdraw cash from a payment account;
3) to execute and receive payment transactions, including credit transfers, to and from the third party.

Case C245/18, Tecnoservice Int. Srl, in liquidation *vs* Poste Italiane SpA

On 3 August 2015, a debtor of Tecnoservice made an order for payment by means of a bank transfer to the company of a sum to be credited to a current account with Poste Italiane, identified by means of a unique identifier within the meaning of Article 4(21) of Directive 2007/64, that is, by an international bank account number (IBAN). The name of the intended recipient of the transfer, that is Tecnoservice, was also stated in the transfer order. The transfer was made to the account corresponding to that IBAN. However, the holder of that account was an entity other than Tecnoservice, which therefore never received the sum due to it. Tecnoservice brought an action against Poste Italiane before the Tribunale ordinario di Udine (District Court, Udine, Italy), the referring court, claiming that Poste Italiane was liable on account of its failure to check whether the IBAN indicated by the payer corresponded to the name of the payee. Thus, it was alleged, Poste Italiane allowed the sum in question to be transferred to the wrong recipient, despite there being sufficient information to establish that the unique identifier was incorrect. According to

Poste Italiane, they cannot be deemed liable as it credited the account corresponding to the IBAN indicated on the order and are not required to carry out any additional checks. The referring court observes that the Directive 2007/64 provides that a payment order executed in accordance with a unique identifier is deemed to have been executed correctly. However, according to the court, Articles 74 and 75 of Directive 2007/64 and, therefore, relevant provisions of the national legislation can be interpreted in two ways. According to the first interpretation, those articles apply only to the relationship between the payer and his bank, and not to the relationship between the payee's bank and other interested parties, such as the payer, the actual payee or the incorrect payee. In such a case, the second relationship should be subject only to national provisions, which are often based on liability rules that are different and wider in scope than those introduced by the directive. According to the second interpretation, the articles apply to the payment transaction viewed as a whole, including the conduct of the payee's bank. In such a case, liability of the payee's payment service provider would also be strictly linked to simple observance of the IBAN indicated by the payer (Court of Justice of the European Union (Tenth Chamber), 21.03.2019).

By its question, the referring court asks, in essence, whether Articles 74 and 75 of Directive 2007/64 must be interpreted as meaning that when a payment order is executed in accordance with the unique identifier provided by the payment service user, which does not correspond to the payee name indicated by that user, payment service provider liability is limited to the payer's payment service provider alone or that such liability extends to the payee's payment service provider (Court of Justice of the European Union (Tenth Chamber), 21.03.2019).

The ECJ rules that Article 74(2) of Directive 2007/64/EC must be interpreted as meaning that when a payment order is executed in accordance with the unique identifier provided by the payment service user, which does not correspond to the payee name indicated by that user, the limitation of payment service provider liability, provided for by that article, applies to both the payer's and the payee's payment service provider.

It means that the payment service provider is not liable for the payer's incorrectly provided IBAN even if IBAN does not correspond to the payee's name indicated by that user. In accordance with Article 74(1) of Directive 2007/64/EC if a payment order is executed in accordance with the unique identifier, the payment order shall be deemed to have been executed correctly with regard to the payee specified by the unique identifier. It means that the payment service provider is liable only if the mistake with an incorrect unique identifier has been made by the payment service provider, If the mistake is made by the payment service user, the payment service user is liable. The same is set in the Article 74(2) of Directive 2007/64/EC – if the unique identifier provided by the payment service user is incorrect, the payment service provider shall not be liable under Article 75 for non-execution or defective execution of the payment transaction. With the judgment court the concept of "payment service provider" includes both payment service providers, i.e., payer's and payee's and, therefore, both payment service providers are not liable if the IBAN is wrong and the mistake has been made by the payment service user.

Case C-295/18, Mediterranean Shipping Company (Portugal) – Agentes de Navegação SA vs Banco Comercial Português SA

MSC holds an overnight deposit account with BCP Bank. Following an audit conducted in 2014, MSC discovered that the account was being regularly debited by way of direct debits in favour of a third party ("the principal") with whom it had no relationship and without it having given any authorisation to BCP Bank to that effect. By letter of 17 November 2014, MSC asked BCP Bank to cancel those direct debits, to reimburse it for the amounts withdrawn and to send it a copy of documents authorising those direct debits. Following some exchanges between the two entities, BCP Bank cancelled the direct debits and repaid the sum of EUR 683.48, corresponding to the direct debit payments made in October and November 2014. In the course of those exchanges, a copy of payment authorisation for the direct debits at issue was obtained from Caixa Geral de Depósitos SA where the account which received those direct debits was held ("the principal's bank"). BCP Bank was then able to see that such authorisation had not been given by the holder of the debited account, MSC, but by the principal, a third company, for the purpose of making payments to that principal by direct debit from an account, with the result that the authorisation highlighted the existence of a discrepancy between the account number shown and the bank identification number which was MSC's bank identification number with BCP Bank. On 10 December 2014, MSC contacted BCP Bank again reiterating that its account had been wrongly debited. By letter of 16 December 2014, BCP Bank confirmed that MSC had not given any such authorisation, or that it was at least improper, and that MSC was accordingly entitled to be reimbursed for direct debits executed up to the legal limit of 13 months laid down in Article 69 of the RJSP, that is to say, a sum equivalent to the direct debits made from October 2013 to December 2014. Therefore, the bank ordered that that sum be reimbursed. Subsequently, MSC found that between May 2010 and September 2013 direct debits had been paid from its account on the basis of that authorisation for a total sum of EUR 8,226.03 ("the direct debits at issue"). By letter of 3 August 2016, it made a request to BCP Bank that it also be reimbursed for that sum, which was refused by the bank (Court of Justice of the European Union (Tenth Chamber), 11.04.2019).

The Tribunal da Relação do Porto (Court of Appeal, Oporto) refer the following questions to the ECJ for preliminary ruling:

1) whether Article 2 of Directive [2007/64] must be interpreted to the effect that the scope of that directive, as defined in that article, includes execution of a direct-debit payment order issued by a third-party on an account which it does not hold, where the holder of that account has not entered into a payment service contract for a single transaction or a framework contract for the provision of payment services with that credit institution?
2) if the answer to question 1 is affirmative, whether that account holder can be considered to be a payment service user for the purposes of Article 58 of that directive' (Court of Justice of the European Union (Tenth Chamber), 11.04.2019).

The ECJ rules the following answers:

1) Article 2(1) of Directive 2007/64/EC must be interpreted to the effect that the notion of "payment services", for the purposes of that provision, includes execution of direct debits, initiated by the payee, on a payment account of which it is not the holder, where the holder of the account thus debited does not consent to those direct debits.
2) Article 58 of Directive 2007/64 must be interpreted to the effect that the notion of "payment service user", for the purposes of that article, includes the holder of a payment account on which direct debits were executed without its consent.

The ECJ explains these answers – for the purposes of Directive 2007/64, the notion of "payment services" is defined in Article 4(3) as relating to "any business activity listed in the Annex". Point 3 of that annex states that such notion covers execution of "payment transactions", which in accordance with Article 4(5) of that directive, are acts initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee. In accordance with the first indent of point 3 of that annex, those transactions include execution of direct debits, including one-off direct debits. A "direct debit" is defined in Article 4(28) of that directive, in essence, as "a payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's consent" and the notion of "payer" is defined in Article 4(7), *inter alia*, as "a natural or legal person who holds a payment account and allows a payment order from that payment account". It follows from those provisions that the execution of direct debits initiated by the payee on an account of which it is not the holder comes within the notion of "payment services" in Article 2(1) of Directive 2007/64, even in the absence of any underlying obligations between the payer and the payee, where the payer, as holder of the payment account thus debited, consented to those direct debits. However, those provisions do not in themselves, in the absence of any reference to that effect, make it possible to establish clearly whether the execution of direct debits by the payee on an account of which it is not the holder also comes within that notion where the holder of the debited account did not consent to those direct debits. If the fact that the holder of the debited payment account did not consent to execution of a direct debit on that account meant that such a transaction could be excluded from the notion of "payment services" in Article 2(1) of Directive 2007/64 and, consequently, from the scope of that directive, those provisions, in so far as they concern unauthorised payment transactions, would be devoid of any meaning or practical effect. It is apparent from the context surrounding that notion that it must be interpreted to the effect that it includes execution of direct debits initiated by the payee on an account of which it is not the holder, even where the holder of the debited account did not consent to those direct debits (Court of Justice of the European Union (Tenth Chamber), Case C-295/18, 2019).

Thus, it is true that, in view of the wording of that provision alone, read in conjunction with Article 4(7) and (8) of that directive concerning the terms "payer" and "payee",

the holder of a payment account which was debited without its consent does not appear to come within that notion of "payment service user". However, execution of direct debits on a payment account, to which the holder of the debited account did not consent, comes within the notion of "payment services" in Article 2(1) of that directive. Also, it is clear from the actual wording of Article 58 and its title that it is specifically intended to apply in particular to unauthorised payment transactions (Court of Justice of the European Union (Tenth Chamber), 11.04.2019).

This judgment is important because it is applying protection from the PSD1 also to the payment service user that has not agreed to use the payment service or even did not have any information that he was using the payment service. The ECJ empowers objectives of the PSD1 allowing to apply PSD1 also in cases where the payment service user has not given consent to receive payment service. The ECJ uses teleological concept interpretation to come to conclusion that the protection of the PSD1 must be applicable to payment service users. Such a concept allows to give a larger level of safety to payment service users and allows easier reach for the aims of the PSD1.

Conclusions

The following conclusions have been put forward:

1) Development of payment services in the EU is one of the major aims currently. To reach this aim EU has issued PSD1 and PSD2. However, an important role in this development is also the ECJ that interprets both directives.
2) Payment instrument under the PSD1 must be considered any personalised devices and/or set of procedures agreed between payment service providers and payment service users. The set of procedures can also include such elements as personal signature and online banking. The key point is whether consecutive actions allow the payment service users to initiate a payment order and if the payment service user can initiate a payment order. The entire process could likely be considered as a payment instrument if the goal of such consecutive actions is to initiate payment order.
3) Durable medium must be compliant with multiple requirements:
   a) the website allows to store information that is personally addressed to the user;
   b) the user can access the information and reproduce it unchanged for an adequate period;
   c) information cannot be unilaterally changed by the payment service provider or another professional;
   d) if the website holder is the payment service provider and if the payment service user is obliged to get acquainted with the information on the website, the payment service provider is obliged actively to draw the user's attention that the information is available on the website;

4) The "adequate period" of storing information related to payment services must be at least the period when the customer receives the payment service. It should also be the period when the payment service user can raise a claim against the payment service provider, and it must be compliant with the national legislation of the period to collect the information that is related to payment services.
5) The "another professional" that is not allowed to change information to payment service user might be a third party that has an agreement with the payment service provider related to the website where the information is stored, somebody that has legal rights to access the information and change it. It is unlikely that with the "another professional" the court also thought about illegal actions to access the stored information.
6) The ECJ base the judgment on the fact that "the operator does not carry out any operation on those customers' payment accounts". Currently, PSD2 considers "account information service" also as a payment service where the payment service provider also does not carry out the operation with the money of the payment service receiver but only with the data related to the account. Therefore, in accordance with the current legislation, it should be clarified that "carrying out any operation on the customers' payment accounts" includes also acquiring information from the account. However, if a person only makes terminal available and loads it with cash, it still should not be considered as payment service.
7) To classify an account as a payment account, the account must have the following functionalities:
   a) consumers are able at least to place funds in a payment account;
   b) they withdraw cash from a payment account; and
   c) execute and receive payment transactions, including credit transfers, to and from a third party.
8) The payment service provider is not liable for the payer's incorrectly provided IBAN even if IBAN does not correspond to the payee's name indicated by that user. The ECJ's concept of "payment service provider" includes both payment service providers, i.e., payer's and payee's and, thus, both payment service providers are not liable if the IBAN is wrong and the mistake has been made by the payment service user.
9) PSD also covers and protects payment service user that has not agreed to use the payment service or even did not have any information that he was using the payment service. In such a way, the ECJ empowers objectives of the PSD1 allowing to apply PSD1 also in cases where the payment service user has not given consent to receive payment service.

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China's Voting Practice at the UN Security Council, Its Legal and Political Interpretation: Case of Syria

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Abstract

This article examines intersection of three contemporary issues that occupy academic thought intensively: China's global politics, its changing voting practice at the United Nations Security Council (UNSC), and the international response to the civil war in Syria. The aim of the article is to provide quantitative and qualitative analysis of China's voting practice in the UNSC regarding the civil war in Syria, to outline a legal and political interpretation of its voting patterns and to conceptualise China's politics in the UNSC regarding this issue. The article argues that reasons behind China's rapidly growing use of the veto in the UNSC regarding Syria are vaguely related to the case of Syria itself, but directly reflect the primacy of China's domestic politics and its strategic aspirations to reshape global governance. Growing concern within the international community about the human rights abuses taking place on a mass scale against Uighurs in Xinjiang is the most prominent catalyst that enables and provokes China's systemic reaction. Therefore, although China has neither geopolitical nor strategic interests in Syria, Syria's case serves as a battleground for China's attempts to transform the collectively accepted interpretation of multilateralism, democratic values, and norms. This aspect underlines the necessity to observe China's politics from the perspective of social constructivism. Methodologically, this article draws on political discourse analysis theory, examines China's arguments in the UNSC and argues that China's voting behaviour in the UNSC regarding Syria focused on reinterpretation of two grand concepts of international law: state sovereignty and non-interference.

Keywords: China, Security Council, Syria, United Nations, veto.

Introduction

The Syrian civil war has been on the UNSC agenda since 2011. If compared to other United Nations Security Council (UNSC) agenda items, it could be characterised as one of the most complex, and the list of international security issues regarding this case includes deaths of hundreds of thousands of people, the use of chemical weapons by Bashar al-Assad's regime, the humanitarian situation, sanctions, military engagement of third parties and clashing interests of UNSC permanent members. Nevertheless, the case of Syria has been a regular subject of a veto in the UNSC by Russia and China (a "tandem veto") or by Russia with China abstaining. In no case has China exercised a "lone veto". Moreover, Syria's case is the turning point in China's voting behaviour in the UNSC: since 2011, it has cast the veto 13 times, and only one of these vetoes has not been related to the case of Syria.

This article examines the radical shift in China's voting practice in the UNSC and gives a legal and political interpretation of it. Traditionally, when observing atypical international behaviour, geopolitical, economic, or strategic interests of the involved party are being sought in a particular country or region in a manner of neo-realism and from the point of view of the balance of power. Nevertheless, there is no evidence of China's direct interests in Syria. China's specific voting behaviour since the very beginning of the crisis in Syria has been regarded as unclear. This article, by conducting political discourse analysis of UNSC meeting records, shows that the answer is not to be sought in the light of neo-realism and the balance of power theory, but rather in the domain of social constructivism, which emphasises the aspect of value systems, norms and ideas that determine state behaviour and mutual relations in the international environment.

The article is structured in three parts that lead from quantitative analysis of the voting behaviour in the UNSC to qualitative political discourse analysis explaining China's vote and analytical conclusions about the motivation that stands behind China's international politics regarding the Syrian civil war and dramatic change of voting behaviour. First, the article outlines that the quantitative view can lead to the conclusion that the case of Syria illustrates and exposes a convergence of China's and Russia's interests or even worldviews. Nevertheless, the second part of the article shows that China's behaviour is characterised by a noticeably clear emphasis on the principles and interpretation of aspects of multilateralism and international norms, therefore China's voting practice in Syria's case must be observed in a wider perspective and separately from Russia's politics towards Syria. Third, this article emphasises that China's motivation behind the voting practice in the UNSC is related to its domestic politics and a possibility to reinterpret two grand concepts of international law: state sovereignty and non-interference in a way that helps maintain stability at home.

1 Use of the Veto in the UN Security Council Regarding the Syrian Civil War: The Quantitative Aspect

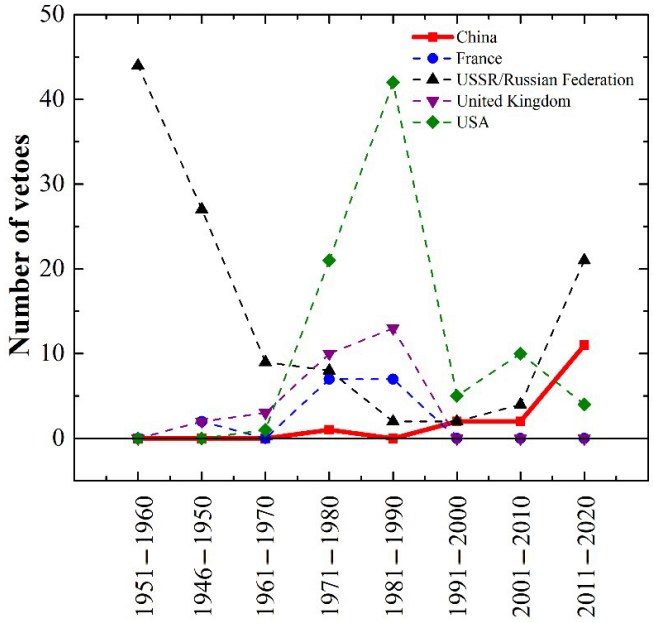
The veto power of the five permanent members of the Council is the term commonly used with regard to the provision of Article 27, para. 3 of the Charter of the United Nations, which provides that:

> "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members" (United Nations Charter).

The right to a veto was granted to the permanent members of the Security Council with the aim to prevent the UN from acting in cases of opposition expressed by superpowers, and the initial debate was more focused on the scope of this right, and not on the question whether the superpowers should be granted veto power (Kennedy, 2006). Although recently the UN celebrated its 75th anniversary, this right has not been abolished despite the tectonic changes in the international system, the collapse of bipolarity, numerous reform attempts and claims concerning its non-democratic nature.

The use of the veto at the UNSC has historically reflected evolutionary phases of the organisation (for example, admission of new members), events taking place in the international environment and permanent members' geopolitical and strategic aspirations *vis-à-vis* one another and regarding specific regional and international conflicts. After the Cold War, the veto powers were used very rarely, and, up until 2011, their use in most cases was related to the conflict in the Middle East – the Israel-Palestine conflict (Security Council – Veto List, 2021). Nevertheless, the dynamics of the use of the veto rights since 2011 have changed again (Fig. 1), and the Syrian civil war is the conflict where permanent members' positions clash.

The new veto dynamics that have emerged with respect to the Syrian civil war preoccupy the minds of academic and political circles because of the China factor. Unlike Russia (formerly the USSR), historically China has been the UNSC permanent member that has chosen to use its veto rights in exceedingly rare cases – only once during the Cold War (the resolution on admission of Bangladesh as a new UN member state), and two times in the period till 2000 (the resolutions on the situation in the former Yugoslav Republic of Macedonia, and with regard to Central American efforts toward peace and stability in Guatemala (Security Council – Veto List 2021). Nevertheless, in 1997, a change in the pattern became visible with blocked resolutions on the situation in Zimbabwe and Myanmar. The outbreak of the civil war in Syria in 2011, however, proved to be the turning point in China's voting behaviour at the UNSC. During the last ten years, China has used the veto rights in the UNSC a total of 11 times (Table 1), and 10 of those have been focused on a single conflict – the civil war in Syria. The only exception from this predominant tendency is the US resolution on the situation in the Bolivarian Republic of Venezuela, which China blocked in 2019 (U.N. Doc S/PV.8476).



Source: Author's calculations based on Security Council – Veto List (2021).

Figure 1. Use of the Veto in the United Nations Security Council (1946–2020)

This trend in voting behaviour is accompanied by another one – the tandem veto by China and Russia. Since 1999, China has never cast a lone veto. All of China's 10 vetoes which have been clustered on Syria's case were cast in tandem with Russia. In addition, all the other Russian vetoes with regard to Syria and the ongoing conflict there are complemented with China's abstention (Fig. 2). From the point of view of a legal interpretation, as the International Court of Justice has declared, voluntary abstention by a UNSC permanent member does not have the same effect as a negative vote (a veto) and the adoption of resolutions with a permanent member abstaining has become a customary practice at the UNSC and it is considered an integral part of UN constitutional law (Legal Consequences for…, 1971; Bailey, 1974; Stavropoulos, 1967). Although China's abstention alone cannot block the adoption of the decision, the tendency to vote together with Russia stands out.

Therefore, from a quantitative point of view, a remarkably simple algorithm is observable with no deviations regarding vetoed resolutions in Syria's case: China and Russia either vote together, or China abstains when Russia blocks. This clear tendency has prompted conjectures about coordinated action and policy between China and Russia, common regional or global geopolitical interests.

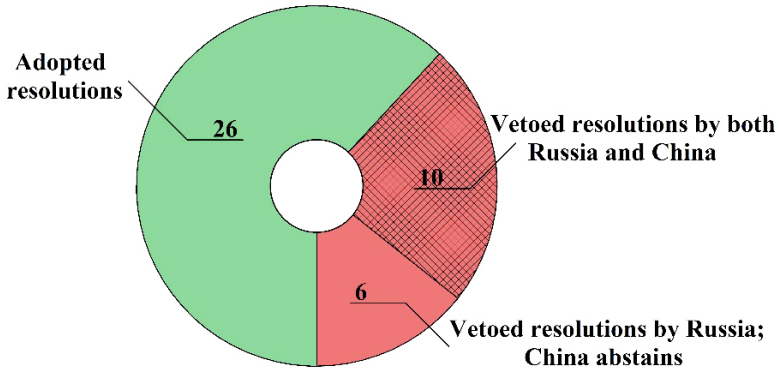
It must be noted that China or Russia have not vetoed all resolutions concerning the Syrian civil war – less than half of them were vetoed (Fig. 2), while a majority were adopted, and that leads to the necessity to analyse the reasons for negative votes.

Table 1. Vetoed UNSC resolutions on the Syrian Civil War (2011–2020)

No	Date	Resolution	Vote*	Veto	Abstention
1	10.07.2020	S/2020/667	13-2-0	China, Russia	
2	07.07.2020	S/2020/654	13-2-0	China, Russia	
3	20.12.2019	S/2019/961	13-2-0	China, Russia	
4	19.09.2019	S/2019/756	12-2-1	China, Russia	Equatorial Guinea
5	10.04.2018	S/2018/321	12-2-1	Russia (Bolivia voted against)	China
6	17.11.2017	S/2017/970	12-2-1	Russia (Bolivia voted against)	China
7	16.11.2017	S/2017/962	11-2-2	Russia (Bolivia voted against)	China, Egypt
8	24.10.2017	S/2017/884	11-2-2	Russia (Bolivia voted against)	China, Kazakhstan
9	12.04.2017	S/2017/315	10-2-3	Russia (Bolivia voted against)	China, Ethiopia, Kazakhstan
10	28.02.2017	S/2017/172	9-3-3	China, Russia (Bolivia voted against)	Egypt, Ethiopia, Kazakhstan
11	05.12.2016	S/2016/1026	11-3-1	China, Russia (Venezuela voted against)	Angola
12	08.10.2016	S/2016/846	11-2-2	Russia (Venezuela voted against)	Angola, China
13	22.05.2014	S/2014/348	13-2-0	China, Russia	
14	19.07.2012	S/2012/538	11-2-2	China, Russia	Pakistan, South Africa
15	04.02.2012	S/2012/77	13-2-0	China, Russia	
16	04.10.2011	S/2011/612	9-2-4	China, Russia	Brazil, India, Lebanon, South Africa

** Votes cast: For-Against-Abstention*

Source: Author's calculations based on Security Council – Veto List (2021).



Source: Author's calculations based on Security Council – Veto List (2021).

Figure 2. Adopted and Vetoed UNSC Resolutions with Respect to the Syrian Civil War (1946–2020)

In addition, the so-called "pocket veto", or the threatened use of veto, is not included in the statistics, as such records are Available fromly in a case when a draft resolution is circulated as a UNSC document and followed by a discussion in the UNSC. Nevertheless, the pocket veto has a considerable impact on the UNSC's ability to act effectively.

2 China's Vetoes Regarding the Case of Syria: Political Discourse Analysis

Three aspects dominate in the UNSC regarding the case of Syria – political, humanitarian, and use of chemical weapons, and all of these have been a subject of veto cast by China. Clarifications provided for a veto or abstention related to UNSC votes with respect to the civil war in Syria have been more general and more concise from China than from Russia. Nevertheless, this does not mean that China lacked arguments.

2.1 First Vetoes: the Political Aspect

Without a doubt, China's first vetoes regarding the conflict in Syria came as a surprise to the international society. Since then, there have been many attempts to explain this manifest shift in voting behaviour, and the searches have predominantly been directed towards the domain of China's eventual political, geostrategic or economic interests in Syria. Other directions of inquiry have been related to possible joint geopolitical efforts and common interests with Russia. Nevertheless, presumptions and inferences were imbued with the spirit of realism and the idea of the balance of power, and they have not provided valid answers.

In fact, China's basic arguments regarding the resolution of the Syrian crisis were outlined already alongside its first vetoes in 2011 and 2012, and they have not changed at their core during the coming years. These principles are state sovereignty, non-interference, territorial integrity, and the imperative to seek political settlements to conflict, accompanied by claims and assertions concerning China's firm position on each of these principles:

> "[…] it [the *international community – auth.*] should fully respect Syria's sovereignty, independence and territorial integrity. Whether the Security Council takes further action on the question of Syria should depend upon whether it would facilitate the easing of tension in Syria, help to defuse differences through political dialogue and contribute to the maintenance of peace and stability in the Middle East. Most important, it should depend upon whether it complies with the Charter of the United Nations and the principle of non-interference in the internal affairs of States […] The Chinese Government's position on those questions has been consistent and firm." (U.N. Doc. S/PV.6627)

For the full picture, China's attitude on sanctions must also be considered; since the very outbreak of the crisis in Syria, China has adamantly opposed sanctions and the threat of sanctions, and this aspect must also be seen in the context of the stated principles. With its first vetoes, China made it clear that it does not see sanctions as

a tool for conflict resolution, since it puts pressure on a certain government. Instead of sanctions or restrictive measures, it prefers mediation as a tool towards a political solution to a conflict:

> "Mr. Annan's mediation is an important and realistic way forward towards a political solution of the Syrian issue. […] However, the draft resolution essentially undermined the consensus reached at the Geneva meeting and seriously disrupted the new round of mediation efforts undertaken by Joint Special Envoy Annan." (U.N. Doc. S/PV.6810)

In the years following its first string of vetoes, China stuck to this position. Moreover, already in 2012, China signalled that it opposes the international pressure on Bashar al-Assad's regime not only in the form of sanctions, but it opposes sanctions in general. Nevertheless, the argumentation does not contain any sign of sympathies towards the regime in question, but rather it concentrates on the principle of non-interference, and stability of other regional governments:

> "First, the draft resolution is seriously flawed, and its unbalanced content seeks to put pressure on only one party. Experience has shown that such a practice would not help resolve the Syrian issue, but would only derail the matter from the political track. It would not only further aggravate the turmoil, but also cause it to spread to other countries of the region, undermine regional peace and stability, and ultimately harm the interests of the people of Syria and other regional countries." (U.N. Doc. S/PV.6810)

It must be noted that while China has no particular interests in Syria and that China's voting behaviour is not oriented toward or targeted at Syria or the civil war there, it remains a grand battleground in which principles and understanding of contemporary international relations are at stake, and this was outlined very explicitly in 2012. Such a detailed explanation did not appear again in later statements by China and seemed to be forgotten by the international community since the focus of concerns was directed at China's aggressive economic policy, rapid growth, and aspirations for global power:

> "[…] sovereign equality and non-interference in the internal affairs of other countries are the basic norms governing inter-State relations enshrined in the Charter of the United Nations. China has no self-interest in the Syrian issue. We have consistently maintained that the future and fate of Syria should be independently decided by the Syrian people, rather than imposed by outside forces. We believe that the Syrian issue must be resolved through political means and that military means would achieve nothing. That is China's consistent position on international affairs. It is not targeted at any specific incident or moment. Our purpose is […] to protect […] the basic standards that govern international relations." (U.N. Doc. S/PV.6810)

The political rhetoric that appeared in 2012 and which persists to this day also concerns China's involvement in the process as a permanent member, and signals the necessity to consider China's position and the principles it highlights more seriously, otherwise adoption of a particular resolution can and will be blocked. This situation characterises the aspect that in legal literature is described as the threat of a veto or a pocket veto,

and it is often as effective as an actual veto as it conveys an unambiguous message to participants in the process of drafting a resolution:

> "[…] the sponsoring countries failed to show any political will or cooperativeness, adopting a rigid and arrogant approach to the reasonable basic concerns of other concerned countries and refusing to make revisions. It is even more regrettable that, in circumstances where the parties were still seriously divided and there was still time for continued consultations, the sponsoring countries refused to heed the calls for further consultation made by China, some other Council members and Joint Special Envoy Annan […] and pressed for a vote on the draft resolution. China is strongly opposed to such practices." (U.N. Doc. S/PV.6810)

Russia and China engaged in a tandem veto of a resolution in which the issue of Syria would have been handed over for examination by the ICC (the International Criminal Court). All other UNSC members voted in favour of the resolution, supporting the need for accountability when war crimes and atrocities have taken place. This resolution had 65 co-sponsoring countries. In its argument, China did not go into much detail but it did repeat its usual references to state sovereignty as well as the principle of complementarity, thereby questioning the legitimacy of the ICC itself as an institution:

> "China is not a State party to the Rome Statute. China always has reservations concerning the referral by the Security Council of particular country situations to the ICC. This is our principled position. […] In the current circumstances, to forcibly refer the situation in Syria to the ICC is not conducive either to building trust among all parties in Syria or to an early resumption of the negotiations in Geneva." (Explanatory Remarks by…, 2014)

Therefore, with its very first vetoes, a reference to state sovereignty and non-interference can be clearly seen in China's argumentation. Nevertheless, China's interpretation of these principles is the most important part of its behaviour, but the reasons and *modus operandi* become clearer only with the next vetoes and abstentions in combination with the resolutions that China supported. Thus, by learning on the ground, the international community has become familiar with the interpretation of multilateralism that China favours and supports or vice-versa – blocks and rejects.

2.2 Vetoes Regarding the Humanitarian Situation

The strongest disappointment and negative reaction have been observed after China blocked resolutions on delivery of humanitarian aid and improvement of the humanitarian situation in Syria. China carefully considers how each move the UNSC makes fits in with its understanding of the principles and it gives unmistakeable signals about its readiness to use the veto under certain circumstances, as well as that the result will be positive for all if countries fall in line.

When China has used its veto power or abstained, the explanation for its vote refers to non-interference in matters concerning Syria's sovereignty and actions taken in a manner so that there will be no infringement on the principle state sovereignty. In

effect, China has politicised humanitarian assistance while at the same time criticising and reproaching other countries for doing the same. China emphasises that it is necessary also with deliveries of humanitarian assistance to respect Syria's sovereignty and territorial integrity and to cooperate fully with the regime of Bashar al-Assad:

> "All categories of humanitarian issues in Syria should be considered in a comprehensive manner and be addressed in a balanced way, instead of only selectively focusing on certain issues, much less to politicise humanitarian issues. The international community must fully respect the sovereignty, independence, unity and territorial integrity of Syria; fully listen to the views of the Syrian government; and seek a comprehensive solution to the Syria issue through political means." (Statement by Ambassador…, 2019b)

This argumentation represents the very essence of China's position: sovereignty, non-interference, coordination with the official government even in situations where the official government is an authoritarian regime that is directly engaged in repressions of its own people as well as employing chemical weapons. China is using this massive humanitarian catastrophe as a case which is in the spotlight of the international community's attention and can be instrumentalised to communicate to the international community an understanding of China's principles and how they will be applied.

In the explanations provided for the use of its veto power, China underlines the need to lift unilateral sanctions against Syria and to evaluate the impact of sanctions on the humanitarian situation in Syria. In this way, China clearly points to its interpretation and perspective on how sanctions represent violation of sovereignty and interference in another country's internal affairs. When China talks about sanctions, they are presented as "illegal sanctions" or "unilateral coercive measures":

> "It must be pointed out that unilateral coercive measures have further aggravated the economic and humanitarian crisis in Syria. Years of illegal sanctions have had immeasurable impact […]. The unilateral coercive measures have also severely undermined Syria's capacity to respond to COVID-19. […] China proposed amendments to the draft resolution. It is disappointing that the draft resolution submitted by copenholders completely ignores China's amendments and does not contain a single word about unilateral coercive measures. China is compelled to vote against such an unobjective and unbalanced draft resolution." (Explanation of Vote…, 2020a)

China diligently promotes its understanding of sovereignty and territorial integrity, by urging acceptance of a Syrian-led and Syrian-owned political process:

> "China has been working tirelessly to help bring about a solution to the issue of Syria, supports the United Nations as the major player in terms of good offices and has been facilitating finding a settlement among the parties that is acceptable to all through peaceful negotiations and based on the principle of a Syrian-owned and -led process." (Statement by Ambassador, 2017a)

China's understanding of multilateral cooperation, which it promotes by threats of a veto, is a regular element in the UNSC debates. For example, in spite of the pressure from the international community to find solutions to the escalating humanitarian

catastrophe in Syria without delay and in spite of the siege and bombing of Aleppo by the Syrian government, the UNSC was still unable to agree at its meeting on the 8th of October about how to address the crisis. At that time, China abstained, offering its standard argument with the combination of sovereignty and territorial integrity as well as what it calls a non-inclusive approach:

> "The draft resolution submitted by France and Spain […] contains a number of humanitarian situations and enhanced efforts to combat terrorism. However, some of the draft resolution's provisions do not fully respect the sovereignty, independence, unity and territorial integrity of Syria. Moreover, the constructive views of some Security Council members were not incorporated." (Statement by Ambassador…, 2016)

Therefore, the Chinese discourse is focused on preserving multilateralism but in a reformulated version, and with a process of consultations among countries which filters and excludes contradictory views and diversity of opinions.

2.3 Explanation of the Veto: Resolutions on the Use of Chemical Weapons in Syria

The most complicated question, in which interests of UNSC members were opposed, was the determination of the responsibility in 2017 for the use of chemical weapons in Syria and the extension of the mandate of the joint investigative mechanism (JIM) of the OPCW (The Organisation for the Prohibition of Chemical Weapons). The UNSC failed in adopting a resolution that would impose sanctions for the use of chemical weapons in Syria because Russia and China voted in tandem to veto it. China's argument was compact; once again, China appealed for unity at the UNSC while, at the same time, breaking that unity with its veto:

> "At present, investigations on the use of chemicals as weapons are ongoing, and it is therefore too early to reach a final conclusion. The Council should preserve its unity and continue to support the Organisation for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism so that it can carry out its investigations in a professional, objective and fair manner and in accordance with the mandate that was conferred to it by resolution 2319 (2016)." (Statement by Ambassador…, 28.02.2017a)

With its interpretation of multilateralism and its pressuring to speak with one voice, China also waved the draft resolution on the chemical weapons attack on 4 April in Khan Shaykhun (S/2017/315). This was the eighth time that Russia used its veto power on a question related to Syria, and, in this case, China abstained. China informed others of its position by saying that the resolution was put forward even with the knowledge that there was no way that it would be supported by all UNSC members:

> "It has been our long-standing hope that the Security Council would speak as one voice on the chemical weapons issue in Syria. […] We deeply regret the failure to reach such a consensus on the draft resolution. The attempt to push through a draft resolution in which serious division still remained among Council members was destined to undermine Council unity and impair efforts to seeking a political solution." (Statement by Ambassador…, 2017a)

In 2018, the atmosphere at the UN Security Council became particularly heated after the use of chemical weapons at Douma. Immediately following that event, the United States decided to put forward a resolution to create an independent investigative mechanism. Russia, for its part, organised a vote on a proposal for an alternative investigative mechanism and a new resolution supporting the OPCW investigative mechanism with respect to Douma. Russia vetoed the U.S. resolution but China abstained. China said it supported an investigation but that accusations of guilt cannot be made till investigation is completed:

> "There should be no prejudgment of the outcome or arbitrary conclusions. […] The draft resolution that was just put to the vote in the Security Council (S/2018/321) had elements of consensus […]. However, on some specific measures, it does not take full consideration of some of the major concerns of certain Security Council members on improving the mechanism's working methods and ensuring an objective and impartial investigation. (Statement by Ambassador…, 2018)

It is worth adding that on the question of chemical weapons, the UNSC has managed to adopt resolutions and that not all were blocked. For example, considering the reports of the OPCW Mission, in 2015, the UNSC adopted a resolution which created JIM (U.N. Doc. S/RES/2235). In March 2015, the UNSC adopted a resolution in which it condemned the use of toxic chemicals and chemical weapons in Syria, but this was done without pointing a finger at the likely perpetrators (U.N. Doc. S/RES/2209).

3 China's Position Regarding the Syrian Civil War: The Motives

The political discourse analysis of Chinese statements and explanations of the vetoes cast at the UNSC regarding the Syrian civil war show that, from the very beginning of that conflict, China refers to two grand concepts of international law – state sovereignty and non-interference. In addition, coordination with the official government is regarded as the optimal way to approach crisis regulation, but achieving an indisputable univocality within UNSC is deemed the only tolerable atmosphere and technique for decision-making in the sphere of international peace and security.

In its statements given at the time that votes were cast, China clearly conceptualises the idea of state sovereignty and non-interference in a very rigid and outdated manner, thus trying to push the international society many decades back, when the concepts of human rights and international criminal law were not yet so prominent. This behaviour fits into a larger Chinese ideological area which is called "global competition over the means of governance" (Starling et al., 2021) and an "all-encompassing game plan for survival in a turbulent world" (Kirchberger et al., 2021).

Stability maintenance is a complex concept with an aim to ensure the status and positions of the Chinese Communist Party (CCP) and President Xi Jinping. A very important element of this concept is, the so-called, social stability management which includes

harsh laws and human rights breaches against different social groups that are regarded as destabilising powers. The most prominent example is ethnic Uighurs in Xinjiang, which are treated as terrorists and placed in, the so-called, Uighur education training centres that are merely concentration camps. Nevertheless, the concerns about Chinese human rights violations are even broader, encompassing repressions against Chinese intellectuals, numerous issues including surveillance and scrutiny of regular citizens, forced sterilisation, abortion, and other coercive population control measures (Roth, 2019).

The issue of human rights abuses against Uighurs and other Muslims in the Xinjiang region has already been raised in a closed UNSC meeting in 2019, and during heated debates China's claim was that the UNSC has no rights to dispute this issue since it is an internal matter of China (U.S., Germany slam…, 2019). In other words – in the face of growing international attention on human rights abuses, China has adopted a firm stance that such scrutiny is not just unwanted but also an unjustifiable interference in their internal matters and a violation of state sovereignty, endangering the CCP course toward stability maintenance.

Clearly, interpretation of the concepts of state sovereignty and non-interference is at the core of this principled discord. In international law and international relations in general, the principles of non-interference and state sovereignty go hand in hand. Article 2(7) of the United Nations Charter speaks about the principle of non-intervention and links it with "matters that are essentially within the domestic jurisdiction":

> "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." (United Nations Charter)

Analysis of China's argumentation in the UNSC clearly shows that China interprets the international community's interest about CCP activities against societal groups in China as "matters that are essentially within the domestic jurisdiction" and therefore, in the light of the UN Charter – as violation of sovereignty, although nowadays international human rights and international law, including international criminal law have limited the concept of sovereignty dramatically. China's international behaviour and attempts to reinterpret the content of the concept of sovereignty therefore have the potential to restore the academic discussion and debates in the practice of international relations. For nearly two decades, the concept of sovereignty has been acknowledged as problematic, and more complex and hierarchical than a classic understanding of it would involve (Lake, 2003), but China's case today brings this debate to the forefront of global governance and the domain of war and peace in an operational sense.

Political discourse analysis shows that China opposes actions of the international community at large and the UNSC in particular in situations that it perceives as an external pressure in favour of regime change in Syria, since it has the potential to create

a precedent and destabilise the socio-political situation in China and abroad (Jafarova, 2014). Therefore, striving for the stability of the regime and the existing political order goes hand in hand with China's global aspirations.

Conclusions

The Syrian case affirms the enormous power granted for the permanent UNSC members, as well as the wide spectrum of possibilities for the eventual use of veto rights. The political discourse analysis of China's statements in the UNSC on the Syrian issue shows that China has become very vocal and more aggressive in its rhetoric. China uses the case of the Syrian civil war in the UNSC to shape global governance in a way that satisfies CCP interests both internationally and domestically. The article shows that China's voting behaviour in the UNSC regarding the Syrian civil war is consistent and pragmatic. It is focused on reinterpretation of two grand concepts of international law: state sovereignty and non-intervention.

China sees the state-owned and state-led process and a rigid concept of inviolability of state sovereignty and territorial integrity as the most appropriate solution of the case of Syria, by opting out of a military intervention, and all the decisions must be made in close cooperation with the government – the regime of Bashar al-Assad. Breach of state sovereignty, in China's view, can also occur in a form of strong condemnation of the regime or threats of sanctions.

China's motivation for such international behaviour is related both to its rise as a global power generally, and a possibility to shape the understanding about core principles of the international system and international cooperation in a way that helps maintain stability at home. For China, it is not the situation in and around Syria that raises a reaction, it is the situation in Xinjiang, Hong Kong, and Tibet, and other issues directly related to violations of international law and human rights that already have caught attention of international society and have the potential to destabilise the regime.

Therefore, in analysis of China's voting behaviour in the UNSC regarding the Syrian civil war three main aspects stand out. First, Syria's case obviously serves as a battleground for China's larger political ambitions, which are vaguely related to the case of Syria itself. Second, since the very beginning the political discourse analysis of China's argumentation and explanation of its voting outlines the very nature of this battlefield, and it falls into category of values and interpretation of principles of multilateralism. China's voting behaviour in the UNSC must be observed as a serious attempt to revisit and consolidate different borders for the governing principles of the international system. Therefore, it must be assessed from the point of view of social constructivism, although it also has characteristics of neorealism, which sees international organisations as tools at the disposal of states, the elements of the balance of power theory or even neoliberal institutionalism. Third, this case is a proof of the old principle "foreign policy begins at home" or the German principle of "Primat der Innenpolitik" (primacy of domestic

politics) – China's active attempts to reshape the principles of non-interference and sovereignty are directly related to its domestic policy and the eventual response of international society to the situation in China.

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Contradicting Narratives on the Spirit of the Laws: Cognitive Discourse Analysis on Narratives in China and Central and Eastern Europe

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Abstract

The aim of the research is to deconstruct communicative narratives within speeches of China's President Xi Jinping thus identifying notions for common ground in cooperation with the European Union, as well as notions that contradicts the spirit of law of Europe. The scope of research materials includes speeches of Xi Jinping addressed in a particular format – cooperation platform with Central and Eastern European countries "17 + 1". This cooperation platform has been chosen as a discourse frame because of its rich content (China addresses 17 countries with various themes and focuses of importance).

Research method utilised is cognitive discourse analysis (CODA) which focuses on those properties of discourse that are accounted for in terms of cognitive concepts. CODA allows to identify models of perceptions how cooperation and attitude toward common agreements should be formed.

Several communicative narratives were identified that directly contradicts to common sense of Europe how cooperation and agreements should be maintained. Most important to mention are: 1) narrative of *visible hand* – as a counter argument on liberal economics – ability to interrupt free market at any situation; 2) narrative of *silver bullet* – a twin narrative of *visible hand* only in domain of political decisions; it includes an assumption that effective cooperation with China as a leader within community

implies quick solutions to any decision-making problems via political intervention in business; 3) narrative of *inclusive globalisation* – includes expectation from all partners to respect deviations from democratic norms and western liberal values.

Keywords: China, 17 + 1, cooperation, Europe, Xi Jinping.

Introduction

Enlightenment in the Western world has been one of the most important steps in advancement of political, economic and legal processes. Because of philosophers and political economists of the time, the modern world both domestically and internationally has been shaped to advance the normative protection of the physical world. Due to increased complexity of societal relations and growing volume of legal norms, principles and regulations, the spirit of the law has become a core aspect to be reckoned with. No law can prescribe every situation and development. Therefore, the law must often be understood in a more inclusive, more conceptual way than it is written.

Differences in understanding, different narratives, different traditions and even different mentalities are often mentioned as reasons for both misunderstandings and conflicts in international relations. Drafting and concluding agreements between societies and countries has not disappeared, it has become more prominent with the globalisation. But, while the texts are being drafted, adopted, signed and ratified, it is the spirit of the law that is still at the core of the agreements. Mutual understanding, if one may, and European understanding of the spirit of the law often tends to differ from that of other societies, cultures and regions. The European understanding of the spirit of the law is entangled in political, economic and cultural experiences of the last three centuries. Since Charles Montesquieu (1748) coined the term and contents of the spirit of the law, many essential developments have taken place.

Those developments, especially in international commerce, are tied to the modern Western understanding that the spirit of the law should also entail the principles of liberal market economies, division not only of political powers, but also of private business and public politics, the core values of human rights, and general trust in both the partner and competitor that they will "follow the rules". When concluding cooperation and trade deals between Europe and China, the understanding of the "spirit of the law" is affected by distrust. Spirit of the law cannot be followed unless both are "on the same page". This research argues that China and Europe are far from being "on the same page" as discursively both sides are interpreting and following different approaches.

The approach of Chinese government, the ruling Communist Party of China (CPC), and the President Xi Jinping is to seek control over economic processes. Private business is seen as a competitor not only internationally, but also as a potential political competitor domestically. Adam Smith's "invisible hand" (1776) that is seen to bring general prosperity to the society in the West, is seen as promulgation of individual greed in the Chinese society. Consequently, politicians and party functionaries are there to manage

the problems of the free market. State and its bureaucratic apparatus are perceived very differently in China and European countries. China seeks to see it as an instrument, while European countries, especially the Western European countries, see government as restraining and intrusive power that impedes economic freedom. While Europe wishes to see private entrepreneurship as a source of advancement of wellbeing, Chinese leadership sees it as both an instrument internationally and a threat domestically to the political power (Bērziņa-Čerenkova, 2020).

What Europe expects from China's offer for cooperation is the research question of this article. Framing China's interests and focusing on strategic foreign policy messages and cooperation potential with various partners, in this case, Central and Eastern European countries, is at the core of this research. The research deconstructs strategic foreign policy narratives of Xi Jinping; nevertheless, concepts of the previous President of China Hu Jintao are also used to detect the internal dynamics of the concepts of the foreign policy discourse.

To answer the research question, the authors have carried out a mapping of agents of Chinese foreign political discourse and identified Xi Jinping's narratives addressed to the European partners. From an epistemological point of view, the authors have chosen international relations social constructivism by Nicolas Onuf. This approach is inextricably linked to the research method – cognitive discourse analysis. The authors have synthesised and applied a new model to analyse cognitive discourse of both China and Europe on the "spirit of the law". The research employs the latest generation of cognitive discourse analysis authors – Thora Tenbrink (2015), Christopher Hart (2013), Gitte Kristiansen (2008), René Dirven (2007), Martin Müller (2001), Luisa Godinho (2016), etc., and more classical texts of Teun Adrian van Dijk (1990, 2006, 2008), Norman Fairclough (1995, 2012), Iver B. Neumann (2002) etc. From method delivery perspective, the authors have screened through speeches of Xi Jinping and grouped the narratives around dimensions of topics, implicit meanings, presuppositions, local text coherences, and lexical meaning and connotation. For grouping texts and meaning, the programme MAXQDA was used.

Considering the growing importance of China in Central and Eastern Europe, where the potential impact on the projection of its power is contributed by several sources, identification of the potential and obstacles is an important additional value to the research. Cooperation platform "17 + 1" has been chosen as a discourse frame because of its rich content; China addresses 17 countries with various themes and focuses of importance, adjusting its message while following local topicality of the particular partner within "17 + 1" format. That allows identifying the full scope of meaning that has been expressed in foreign policy discourse. During the research, more than 200 speeches of Xi Jinping were analysed (between 2012–2017). Therefore, the authors have identified a chain of narratives that serve as obstacles for future cooperation with Europe, because of their content in contradiction to Europe's common sense; as well as a chain of narratives that can help to maintain and develop fruitful cooperation between China and Europe, CEA countries in particular.

Xi Jinping and China Dream – Politics and Interests behind Cooperation

Foreign policy concepts such as *peaceful development* and *harmonious world* directly addressed to international society have been in China's agenda since Hu Jintao's address in 2004 (Guo, 2021). These concepts include a renaissance of China internally and its emergence into global governance from an international perspective. The *China Dream* was introduced in 2012 by Xi Jinping, previous concepts of Hu were integrated in a much more assertive perspective on China's development. Indeed, 2013 was a turning point in which China's ambitions became more real, hand in hand with the newly elected President Xi Jinping at the end of 2012, who started new political initiatives. The reasons for this were international as well as internal interests.

From the economic perspective, the year 2013, with its more or less clear borderline as the end of the world financial crisis, has shown which countries came out of the crisis more successfully. China was one of them. Although there are indications of inner longer-term structural problems in China's economy – like productivity fall and deformed state of the balance of payments – it is not comparable with the crippled tempo of growth in Europe and other Western countries around 2013. The main number which is used in China strategic messages as a success story backbone is the GDP growth; according to this number, China always follows the planned path. Thus, since 2013 China's attitude toward the West (especially Europe) has been more self-confident than ever before (Chen, 2018).

Equally important is the role of the U.S. in Asia in 2013. A partial shift of attention in the international area, and simultaneous partial inability to make sharp decisions in the case of Syria conflict which aroused in international agenda in reality had changed the *sense of balance* in Asia, and China was keen to take the initiative. Experts on international relations and China especially have given a new name to China's mode of activity in response to the shift of poles on a global scale – "assertive authoritarianism". This mode of action includes two levels: international and national (Moore, 2013).

Looking from an international perspective, the "assertive authoritarianism" of the President Xi Jinping shapes the region in terms of a China-centred Asia Pacific since 2013. This indicates a chain of precisely planned and delivered activities. First is the infrastructure investment strategy – Beijing has pledged to build a significantly new Asia connection facility to connect the region through railways, roads, and pipelines. This also includes enhanced regional trade and financial cooperation. Expansion of infrastructure and economic ties cannot be seen separately from Beijing's expansion and enforcement of Chinese sovereignty claims in the region.

Phraseology of mutual friendship becomes questionable when looked at China's attitude and reactions to issues of territorial integrity starting Xi Jinping's presidency. China's decision to impose an Air Defence Identification Zone (ADIZ) over a large part of the East China Sea has heightened tensions in an already volatile area, turning from exceptional to an already conventional strategy on territorial integrity issues in 2018. The ADIZ was

the first in a series of Chinese actions that seem to show a contradiction in the way that China engages its neighbours. The above-mentioned ASEAN example purely supports this argument – China appears to have largely succeeded in building the image of a peaceful partner in the region while swaying between the fear of an assertive giant up north and the temptation of doing business with the world's second largest economy, all at a time of growing uncertainty about U.S. reliability in this part of the world (Holmes, 2013).

On the national level, the President Xi Jinping since 2013 has been proceeding on a straight course of political power consolidation. Firstly, *cleansing* along political party lines has been maintained through an anti-corruption programme – particularly against those senior Chinese officials who suffer from the perception of being disloyal. Secondly, broad and varied limitations are implemented in the online environment against dissenting voices. Thirdly, and equally importantly, the President Xi is institutionalising his weight in security and economic policy with the help of newly founded organisations which are under his direct control. The first of these is the Chinese equivalent to the U.S. National Security Council, which will give the President Xi a direct impact on the country's vast domestic security apparatus and its foreign security policy. The establishment of this National Security Council takes over from the Central Committee and from the Politics and Law Commission (Buzan, 2010).

The second established organisation of the President Xi is an advisory and reform team, the mandate of which is to report directly to the top leadership rather than to the government. With this step, a powerful bureaucracy and its policies, which are resistant to change but very ambitious, are balanced by the autonomy of the presidential institution. "The team will be in charge of designing reform on an overall basis, arranging and coordinating reform, pushing forward reform as a whole and supervising the implementation of reform plans," reported Xinhua, the PRC's news agency (Xinhua, 2013).

Mentioned above are realities that China has been implementing under the umbrella of the presidency of Xi Jinping and the concept of China Dream's historical and political context since 2013. Nevertheless, from social constructivism theory perspective and role of language in strategic foreign policy formation, it is important to acknowledge the linguistic frameworks and contexts of "fixed language" and messages included in documentation of China or so-called normative aspect of China's foreign policy in Xi Jinping's presidency.

Written Strategies behind Xi Jinping's Speeches and Addresses to International Society

The normative perspective behind Xi Jinping's speeches and addresses to international society is rooted in written sources of the PRC considering its foreign policy and international affairs aims. As one of the core documents can be mentioned Foreign Policy Strategy of the PRC (2013–2023) (Global Strategy, 2013). Within the respective Strategy, China's peaceful development concept is present accomplished with elements

which are novelty comparing with the period before Xi Jinping. Taking into account that, at least from the Western perspective, China's evaluation is mostly expressed in radically polarised views (one side argues that all strategic concepts of China include threats to International Stability and Order and leads to "Rise of China", while representatives of opposite view argue that China is going "unique China's way" and these efforts only stabilize International Order), all strategically normative outgoing strategies are based on "middle grounding process" of mentioned polarisation. This means China is implementing different aspects from both views in mentioned dialectics. Nonetheless, there are two important directions that can be outlined from Foreign Policy Strategy of the PRC (2013–2023) which are relevant to representative addresses of the President Xi.

First, in the new foreign policy strategy of China, alongside peaceful development ideas protection concept of China's national interests and their protection grows more intensely. Thus, strategic vision of China becomes more reality oriented and politically pragmatic. Nevertheless, it also shows growth of ambitions of China (Global Strategy, 2013).

Second, in real policy agenda, China tries to implement partials from peaceful development concept, which includes region stabilisation and role increase in International Order. Therefore, both in theory and reality, China's peacefulness and ambitions go side by side – making it a more "real" player in International Order than ever before – because times with just theorising are over, and China expresses real not normative concepts to other countries. It also includes quite a controversial approach toward soft power elements which are implemented simultaneously. China keeps the option to choose when it is convenient to use realistic approach strategy and when to use soft power elements (Haas, 2017). Such a two-level game is a definitive novelty (especially with the number of real-politics and geopolitical interests) and even not comparable with peaceful development road of Hu Jintao's period.

Strategic Messages in Speeches of the President of the PRC Xi Jinping

The most vivid example where strategic messages of the President Xi Jinping definitely can be found in his speech were delivered at the 19th National Congress of the Communist Party of China, October 18, 2017. The essence of the nature of the speech from strategic messaging perspective can be formulated quoting Matthew P. Funaiole and Bonnie S. Glases:

> "…The portrayal of China as a governance model for other nations is especially worrisome as it suggests a newfound willingness to offer an alternative to the Western liberal international order and directly confront the United States, which has previously been eschewed. As articulated in the Party Congress work report, Xi's vision for the future may signal an intention to double down on challenging elements of the prevailing world order that Beijing sees as contrary to Chinese interests. Should this come to pass, the international community might look back at the 19th Party Congress as the moment

> when China's long march toward reclaiming its great power status was matched with the confidence needed to present China as a buttress against Western liberalism…" (Funaiole, Haas, 2017)

Examining the speech and take-aways from it, several novelties can be found. China sees volatile international order with elements of multipolarisation as a potential to increase its power and maintain its interests. The elements of mirroring the USA from this perspective as the next global power not only in economics but also global governance is clearly present, and for the first time, also fixed in a precise and focused narrative. China's national development plan until 2049 delivered by the President Xi consists of two phases: first phase (2020–2035) is for reaching China's global leadership in innovations in economics; seconds phase (2035–2050) aims to geopolitical perspectives to become a "global leader in terms of comprehensive national power and international influence". From international order perspective, global leadership is a novelty compared with political messages of China in the past 15 years.

There is a clear competition to the Western type of democracy in the perspective of China – or strong advocacy of regimes which from the Western perspective could be labelled as hybrid-regimes, or in worst cases an authoritarian rule. It includes not only Xi Jinping's warning that the PRC would never copy political systems in other countries and China's leaders have no interest in western notions of democracy, but also a signal to other countries that Western democracy in not the only way to go. It is a momentum of negative soft power toward Western democracy, but represented in a very authoritative way, which was unimaginable under previous presidency of China.

A very distinct outline is a direct addressing the issues of People's Liberation Army with its strategic purpose to increase capacity and readiness to stand for China's interests. Open delivery of PLA power and necessity to increase its capacities is a signal of much more pragmatic and geopolitically oriented China than ever before since opening to the West. Another finding is that issues of territorial integrity were strongly present, sending the message about China's territorial unity both to internal and external actors. Quoting Xi "We will not tolerate anyone, using any means, at any time to separate one inch of land from China [...] Blood is thicker than water" (Xi, 2017).

The mentioned points are a clear novelty to previous discourse of China and, in fact, announces new era in China's attitude toward foreign policy and international order on global scale. Thus, screening of Xi Jinping's speeches on matter of cooperation with European countries, and in "17 + 1" format gives opportunities to see dynamics and expectation from regional partners.

Cooperation within "17 + 1" – Specific Format on Its Own

Over the past 30 years, the PRC and the countries of Central and Eastern Europe have experienced fragmented phases of relationship. The "17 + 1" format initiative serves both as a new regional approach and as a platform for cooperation for the most ambitious policy of other relationship initiatives, and as part of the major strategic narratives of

the PRC (Vangeli, 2019). The start of institutionalisation for the "17 + 1" format is considered 2011 when, on an official visit to Hungary, the Prime Minister of the PRC Wen Jiabao announced the commitment of the PRC to develop an enhanced relationship with the CAEV countries, and that a new format of cooperation and institutional mechanism should be developed to realise this commitment.

In parallel to this format, the "Road and Belt" initiative strengthens the existing "17 + 1" cooperation and acts as a separate vision, with China's own foreign policy views more dominating (MFA of Latvia, 2016). It is essential that, together with the development of cooperation, "12 measures" were also adopted at the meeting of the Prime Ministers of the Member States, which included the aims of international cooperation and the way in which cooperation would also be pursued in the context of policy instruments and practical interaction between actors (Belt and Road Centre, 2017).

After China's offer for special cooperation with the countries of the region concerned, the prevailing discourse in the western community included reaction and view that China already has a well-established and detailed plan with the terms of cooperation (Li, 2019). However, although perceived as a tactical initiative at policy level, the "17 + 1" format actually includes a set of messages that are as fragmented and voluminous as strategic level concepts in the foreign policy of the PRC, by obtaining a widespread and used designation, a multilateral multi-level cooperation initiative or the so-called multi-layered multilateralism (Minghao, 2016).

As described by Weidong Liu and Michael Dunford, to understand the "17 + 1" format of the PRC in the context of the "Road and Belt" initiative, it is necessary to understand the dynamics of sustainable economic growth in the PRC and its interpretation in the vision of China's political elite, viewing its place in globalisation, both as its driver and user of globalisation goods (Liu and Dundorf, 2016). Consequently, it is essential to see foreign policy initiatives of China in the context of major strategic narratives, as they are not a vertical derivative, but rather a parallel framework with their own strategic messages. Consequently, in their internal logic and narrative dynamics, there are not only direct parallels and similarities, but also deviations with their considerable logic.

In the "17 + 1" context, there is also a significant increase in China's economic impact and concerns about China's economic interests abroad. One of the most important effects is the increase in interdependence, highlighted by the Covid-19 pandemic, revealing asymmetry in favour of China (Kugiel, 2016). This has been accompanied by instrumental activities in China's foreign policy to achieve certain objectives. Reciprocal trade volumes have increased, but Chinese export flows to CAE countries are significantly higher compared to CAE exports. This has contributed to the development of a negative trade balance with China and its gradual deterioration, with CAE's trade deficit growing rapidly in recent years.

The impact of the benefits of China's protected domestic market is multifaceted for European companies. It puts pressure on EU competitors by reducing their income and global market share. In sectors where China's advantage is most extreme, it also

could lead to deterioration of financial creators of EU companies or even bankruptcy of companies. In other words, it artificially directs revenues and profits from Europe to China, threatening European companies. This in turn has an impact on job creation and can significantly restructure an economy with high and long-term adaptation costs, particularly in high-tech sectors. Such an impact could lead to protectionism of European companies by reducing public support for free trade (Kratz and Ortel, 2021).

Considering this, it is clear that "17 + 1" format is unique case study possibility where China delivers various political messages and instruments for cooperation. Narratives of cooperation and attitudes toward legal frameworks as well as design of agreements are first to understand to explain potential and obstacles in common future of China and CAEV.

Narratives on Cooperation and Agreements in Speeches of Xi Jinping

Cognitive discourse analysis (CODA) which focuses on those properties of discourse that are accounted for in terms of cognitive concepts was used for screening more than 200 speeches of Xi Jinping (between 2012–2017). Following narratives were identified with specific content addressed to "17 + 1 partner states".

"17 as 1" narrative. From China's perspective, effective cooperation of "17 + 1" requires internal cooperation between partner countries of the PRC on political scale. The regions can only develop together, and this cooperation should take place under leadership of the already existing largest partner – PRC itself. In practical terms it means demanding partner states to act as one, but agenda how this unity should be delivered should be drafted by China. Actors from the business sector thus are strongly dependent on political mindset of their country toward China.

Obligated to enthusiasm narrative. Partner states should voluntarily express their enthusiasm for cooperation with China. The principle of setting up the "17 + 1" secretariat includes the need for partner countries to take an initiative to cooperate with China, which puts itself in the superior partner position, while simultaneously creating distinction between the PRC and other countries through the branched bilaterality – communication is maintained through the secretariat and with individual countries. This creates a narrative advantage for China by fragmenting its partner – and by expecting a single, but in practice, separate communication from 17 countries. It is obvious that *17 as 1 narrative* contradicts *Obligated to enthusiasm narrative* on the first sight, but looking beyond the first impression – *17 as 1 narrative* includes total support for cooperation with China as a base line within CAEV countries, while the second narrative demands showing good will on regular basis.

Narrative of visible hand. In most speeches, Xi Jinping highlights expectations of the speed of political agreements for the speed of agreements at other levels, through

which, in principle, the restrictive institutional aspects of partner countries are criticised. In the context of expressionism, a strong executive power of policy decision-making is expected, which in most "17 + 1" partner countries are a nonexecutive task due to existing regulatory traditions and democratic conditions. Governments which can speed up business and remove institutional obstacles are perceived as a visible hand (a counter argument to visible hand of Adam Smith). This narrative strongly conflicts with the Western mindset of division between politics and free market as well as the principle of division of power.

Silver bullet narrative. This is a twin narrative of *visible hand* only in domain of political decisions. It includes an assumption that effective cooperation with China as a leader within community implies quick solutions to any sorts of decision-making problems via China's expertise, resources, and political experience. China as a saver, donor and superior in status to CAEV countries automatically puts them in asymmetrical position. Thus, China sees CAEV partners as underdeveloped and the wish to cooperate should be taken as an opportunity even if China has better options in agreements on cooperation.

Narrative of inclusive globalisation. China as a mover of globalisation and a transformer of the values of globalist capitalism expects tolerance toward values that deviate from liberal democracy. In international relations with other countries this means not including Western democracy rhetoric in negotiations, and even more, it expects total lack of criticism toward China. To some extent, the PRC in this format is able to distinguish itself from the potential criticism of the values of democracy while maintaining its place at the negotiating table.

Conclusions

The aim of the research was to deconstruct communicative narratives within speeches of China's President Xi Jinping, thus identifying notions for common ground in cooperation with the CAEV countries as well as notions that contradict the spirit of law of Europe. The scope of research materials included speeches of Xi Jinping addressed in a particular format – cooperation platform with Central and Eastern European countries "17 + 1". This cooperation platform was chosen as a discourse frame because of its rich content where China addresses 17 countries with various themes and focuses of importance. As a research method cognitive discourse analysis (CODA) was used that allowed to identify models of perceptions how cooperation and attitude toward common agreements should be formed.

Several communicative narratives were identified that directly contradicts a common sense of Europe how cooperation and agreements should be maintained. Most important to mention are: 1) narrative of *visible hand* – as a counter argument on liberal economics – ability to interrupt free market at any situation; 2) narrative of *silver bullet* – a twin narrative of *visible hand* only in domain of political decisions, which includes

an assumption that effective cooperation with China as a leader within community implies quick solutions to any decision-making problems via political intervention in business; 3) narrative of *inclusive globalisation* which includes expectation from all partners to respect deviations from democratic norms and Western liberal values.

Clearly, China's messages and expectation are multi-layered, delivering expressions of superiority and dualism of modesty in the PRC in various speeches and manifestations. China positions itself as a developing country, a power-recovering superpower and a peaceful global player. Xi Jinping's speeches are a targeted attempt to strategically drive the change of ideas by unifying the international identity of the PRC through practical cooperation formats. China is ready to cooperate, but it clearly demands cooperation according to China rules of the game, which in detail contradicts to Spirit of Laws of Europe.

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Problems of New and Interim Financing in Restructuring Proceedings

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Abstract

This article focuses on problems of new and interim financing in restructuring proceedings. It discusses the needs for additional financing in restructuring proceedings and how it should be granted. Also, the authors analyse the regulation and protection of interim and new financing in the European Union law. The authors argue that though Directive on restructuring and insolvency aims to increase effectiveness of restructuring proceedings, the regulation of interim and new financing triggers questions whether it is compatible with the goals of restructuring proceedings.

Keywords: restructuring proceedings, new and interim financing, European Union law.

Need of Additional Financing in Restructuring Proceedings

Restructuring proceedings are commenced to rescue a debtor which has encountered solvency problems (Bork, 2020; *165*). Such proceedings shall be effective (Tamošiūnienė, 2020; Drescher, 2013; Finch, 2009). Since restructuring is based on the idea that a debtor continues business activities during all restructuring proceedings, additional financing ("working capital") [1] may be required to ensure continuation of a debtor's business imme-

[1] According to the study of the European Law Institute "Rescue of Business in Insolvency Law", there are various synonyms to this notion, for instance, "new financing", "post-commencement finance", "post-insolvency financing", "post-bankruptcy financing", "new priority finance", "new financing", "additional funding", "new money", "fresh money", and "interim finance".

diately after commencement of restructuring proceedings and preserve the going concern value of a debtor's estate. Such continuation of business activities is possible only if a debtor has necessary capital to pay off debts and salaries, perform contracts and actively participate in the market. A debtor may need additional capital to buy necessary assets, improve commercial activities and perform other actions which would rescue a company and allow continuation of business; thus, a restructuring plan is implemented. Also, without new financing, not supplying the cash needs of a company can cause business to be closed or liquidated (Epstein, 1992). Therefore, in some cases it would not be possible to reach the goals of restructuring proceedings without additional financing. Availability of new and interim financing for financially distressed companies can promote the continued operation and survival of the debtor company (Payne, Sarra, 2017). It has been recognised in the US bankruptcy law that "on permitting parties to negotiate market agreements that do not overreach or negatively impact the rights of other stakeholders beyond the terms necessary to obtain postpetition credit in a particular case" (ABI Study, 2014; *77*).

In restructuring proceedings usually new lenders, instead of shareholders should provide cash to meet the necessary costs of continuation of business activities.

Provision of additional financing for the debtor in restructuring proceedings is established in the US restructuring law. Pursuant to 346 of the US Bankruptcy Code if the trustee is authorised to operate the business of the debtor under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title; unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense. The court, after notice and hearing, may authorise the trustee to obtain unsecured credit or incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b (1) of this title as an administrative expense. Thus, in the US bankruptcy law provision the approval of the court of additional financing in restructuring proceedings is needed. This *ex ante* confirmation of lawfulness of additional financing is an important element for lawfulness of such financing. The general idea of provision of addition financing in the US bankruptcy law has served as a source of inspiration for the Directive (McCormack, 2021; *3*). Also in other countries provision of additional financing may be required by the creditors. For instance, pursuant to Article 160(2) of the Insolvency Law of Germany, the creditors' committee is also required to approve relevant interim financing.

The need for additional financing as an instrument for effective restructuring proceedings has been already accepted in international soft law documents on insolvency law. For instance, UNCITRAL Legislative Guide on Insolvency Law has recognised that to ensure continuity of the business, it is highly desirable that a determination on the need for new finance be made at an early stage, in some cases even in the period between the time the application is made and commencement of proceedings. Availability of new finance will also be important in reorganisation proceedings between commencement of the proceedings and approval of the plan (United Nations, 2004; *114*). However, there are no specific rules how and in which situations exactly additional financing should be granted and how transactions which grant additional financing should be protected.

The need for additional financing was also recognised by the European Law Institute in the Study on Rescue of Business in Insolvency Law in which two types of additional financing are distinguished:

- interim finance which is described as short-term funds that are necessary for the debtor to cover administrative expenses after the commencement of restructuring or insolvency proceeding until either the implementation of the restructuring plan or the sale of the debtor's business is a going concern;
- new finance which is described as any new funds, whether provided by an existing or a new creditor, that are provided to fund the implementation of a restructuring plan (European Law Institute, 58; *63*).

Therefore, a difference is made between short-term funds which are necessary to maintain a debtor's business activities and new funds which are primarily necessary for continuation of business activities.

The main aspects of additional financing in restructuring proceedings are: 1) administrator of the estate (insolvency practitioner or debtor in possession) has the right to take out interim finance based on their own discretion; 2) any priority for new finance repayment claims in a subsequent insolvency requires a specific clause in the restructuring plan and consequently require approval of creditors and the court; 3) statutory safe harbour for interim and new finance from lenders liability or claw back claims in case subsequent (formal) insolvency should be established; 4) protection of lenders of interim or new financing should follow the general rules of civil law rules (European Law Institute, 2017). Thus, it is recognised that additional financing should be provided when a debtor believes it is necessary for continuation of business. Also, it should be approved by the court and certain legal protection is provided to transactions which grant additional financing. However, the questions arise: what incentives should be established in the restructuring law for provision of interim and new financing; how transactions which provide additional financing should be protected; whether approval of the court is always necessary for interim and new financing; how abuse of restructuring law can be avoided when such additional financing is provided.

Regulation of Additional Financing in Restructuring Proceedings in the European Union Law

The need for additional financing in restructuring proceedings had been recognised by the Member States of the European Union even before the adoption of the Directive on restructuring and insolvency[2] (thereinafter – Directive). It was

[2] Directive (EU) 2019/1023 of the European Parliament and the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) OL L 172.

established that protection of new financing and interim financing (essential in ensuring restructuring plans' success) varies among Member States, ranging from minimum protection from avoidance actions to a form of priority over existing debt in subsequent insolvency procedures. [3]

The Directive aims to harmonise certain aspects of corporate restructuring proceedings. This is the first attempt in the European Union law to regulate certain material aspects of corporate restructuring proceedings. The Directive does not establish comprehensive restructuring proceedings which would overlap national legislation of corporate restructuring proceedings of the Member States. Instead, it only regulates certain elements of restructuring proceedings which are important to ensure effective restructuring proceedings. One of the aims of the Directive is to ensure viable enterprises and entrepreneurs that being in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating (Recital 1 of the Directive). Thus, the Directive aims not only to provide restructuring mechanism, but also requires that a debtor shall continue operating during restructuring proceedings. This is a particularly relevant goal since in restructuring proceedings a debtor already has solvency problems but continuation of business activities is crucial for effectiveness of restructuring. Also, some authors argue that the debtor will benefit from a time-limited "breathing space" from enforcement action in order to facilitate negotiations on successful restructuring (McCormack, 2021, 3).

The main goal of the Directive is to increase efficacy of restructuring proceedings. It aims not only at preventing the liquidation of the entity but also at preventing the need to open a fully-fledged insolvency procedure supervised by the courts and coordinated by an insolvency practitioner (Weijs, 2018). Namely one of the elements which should allow to reach this goal is interim and new financing. Thus, the Directive establishes certain rules on interim and new financing which should increase effectiveness of restructuring proceedings and harmonise the regulation of restructuring proceedings in this area.

The Directive provides definitions of interim and new financing. Pursuant to Article 2(1)(8) of the Directive, "interim financing" means any new financial assistance, provided by an existing or a new creditor that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business. The definition of new financing is broad and encompasses any financial assistance for operation of business after commencement of restructuring proceedings. Thus, interim financing could be provided from the moment of commencement of restructuring proceedings and confirmation of restructuring plan. Since this period can be sufficiently long, a debtor may need additional financing to support continuation of business activities.

[3] Proposal for the Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM/2016/0723 final.

According to Article 2(1)(7) of the Directive, "new financing" means any new financial assistance provided by an existing or new creditor to implement a restructuring plan and everything included in that restructuring plan. The substance of new financing is established similarly to interim financing and encompasses any financial assistance. However, the major difference between these types of additional financing is provision in time. New financing is required for proper implementation of a restructuring plan, meaning that such financing is primarily necessary to ensure that the debtor will effectively implement the restructuring plan when it is confirmed. Thus, new financing is used from the moment of confirmation of a restructuring plan until the end of restructuring proceedings (implementation of a restructuring plan). Interim financing is granted after commencement of restructuring proceedings when negotiations for a restructuring plan between a debtor and creditors begin. It seems that the definitions of interim and new financing in the Directive are compatible with the current international definition of these types of additional financing in restructuring proceedings.

The notion of *financing* is not provided in the Directive. However, pursuant to Recital 66 of the Directive, financial assistance should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period. Thus, interim and new financing should not only mean financial support in strict sense (for instance, grant of a loan or a guarantee), but also supply of necessary means for continuation of a debtor's business. This broad interpretation of financing means that the Directive aims to attract more financial support to the debtor which is relevant for restructuring proceedings.

Protection of Interim and New Financing Related Transactions

Interim and new financing are specific forms of financing. It is generally accepted that in restructuring proceedings transactions which provide such additional financing should be protected and the general rules of transaction avoidance are applicable to a limited extent. This is one of the major incentives for grantors of interim and new financing. Also, providers of additional financing often enjoy a priority ranking of their claims in case of debtor's liquidation. Such protection of new and interim financing is an important incentive for provision of additional financing since the lenders are often not willing to lend money to the company which has encountered financial problems. Nevertheless, protection of transactions of interim and new financing in the Directive has already attracted scholars' attention and triggered discussions whether these rules are compatible with the goals of restructuring proceedings (Weijs, 2018; Payne, Sarra, 2017; McCormack, 2020; Tollenaar, 2017).

According to Recital 66 of the Directive, interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in

the context of subsequent insolvency procedures. Moreover, the Directive establishes a significant safe harbour for providers of interim and new financing. Pursuant to Recital 67 of the Directive, national insolvency laws providing for avoidance actions of interim and new financing or providing that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties could jeopardise the availability of financing necessary for a successful negotiation and implementation of a restructuring plan. The exceptions to the rules of protection of transactions of interim and new financing are mentioned in Recital 68 of the Directive which establishes that when interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority. To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected. Furthermore, this Directive should not prevent Member States from introducing an *ex ante* control mechanism for interim financing. Member States should be able to limit the protection for new financing to cases where the plan is confirmed by a judicial or administrative authority and for interim financing in cases where it is subject to *ex ante* control. An *ex ante* control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring, by a creditor's committee or by a judicial or administrative authority. Protection from avoidance actions and protection from personal liability are minimum guarantees that should be granted to interim financing and new financing.

The rules on protection of transactions of interim and new financing are regulated in Article 17 of the Directive. According to Article 17(1), Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:

(a) new financing and interim financing shall not be declared void, voidable or unenforceable;
(b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

These rules are rather vague and provide almost absolute protection of transactions of interim and new financing. Some authors have rightly pointed out that the Directive offers too little protection against abuse and opportunistic use of interim financing by both debtor and interim lender and it is insufficiently clear as to what problems it seeks to provide a solution for (Weijs, 2018). It can be noted that the Directive does not harmonise the rules on transaction avoidance. Instead, it protects transactions which provide new and interim financing by declaring that such transactions are uncontestable in the court. Also, protection of grantors of new and interim financing is established. It is also doubtful whether such protection is proportionate particularly regarding application of criminal

liability. Nevertheless, according to Article 17(2–3) of the Directive, there are exceptions which the Member States may choose to transpose in national laws:

- Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to *ex ante* control;
- Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay their debts as they fall due.

The authors believe that these exceptions could significantly contribute to establishing lawfulness of transactions of interim and new financing. As it has been mentioned in other countries, for instance in the US, the confirmation of the court of additional financing in restructuring proceedings is necessary. Though the Directive aims to limit involvement of the court in restructuring proceedings, namely an *ex ante* control of the court of transactions of interim and new financing could ensure lawfulness of such transactions and allow avoiding abuse of this protection. Another exception relates to the need of additional financing to ensure solvency of a debtor. In case a debtor becomes insolvent, it is doubtful whether provision of interim and new financing contributes to the goals of restructuring proceedings.

Furthermore, the Directive establishes a significant incentive for provision of interim and new financing. Pursuant to Article 17(4) of the Directive, Member States may provide grantors of new or interim financing to be entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims. Therefore, a grantor of interim or new financing may enjoy priority in the ranking of creditors in case of subsequent insolvency proceedings. This rule encourages creditors to support a debtor secure their claim. Some authors argue that namely the possibility of a priority charge for interim and new financing have the greater potential effect for incentives to provide additional financing (Payne, Sarra, 2017). Such argument is well founded since such incentives for the grantors of additional financing should be provided.

The Directive does not regulate how the debtor should use interim and new financing. Recital 68 of the Directive establishes that to avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected. Nevertheless, Article 17 of the Directive which regulates protection of new and interim financing does not establish any guidance when such financing should be granted. The authors believe that absence of such regulation in the text of the Directive may open doors for possible abuse of restructuring law. This is a particularly significant issue since the sole purpose of such financing could be a possibility of pay off debts and interim and new interim financing might be used in a restructuring plan, there is a real risk that the new money borrowed will in part be used to pay off the creditors who have guarantee from management or shareholders (Weijs, 2018). In such cases management and shareholders of the debtor may pretend that they used

interim or new financing for restructuring purposes, but, in reality, use such financing to increase a balance sheet solvency situation and reduce the risk of their liability towards the creditors in case liquidation proceedings are commenced latter.

Thus, even the Directive introduces interim and new financing for the purpose to ensure continuation of debtor's business activities. It lacks safeguards which would ensure that such financing would be used for legitimate purposes. Moreover, even grantors of interim and new financing could seek unlawful goals, for instance, to provide such financing in order to secure position and priority ranking in satisfaction of creditors' claims. Considering the possibility of abuse of restructuring law, the authors believe that an *ex ante* judicial control of interim and financing should be mandatory. Though the Directive limits involvement of a court in restructuring proceedings, namely judicial control could ensure lawfulness of interim and new financing.

Conclusions

The Directive aims to improve effectiveness of restructuring proceedings. One of the elements of effective restructuring proceedings is the possibility for a debtor to acquire additional financing which may be necessary to continue operation of a debtors' business. The authors agree that harmonisation of interim and new financing is not needed. In contrast, certain harmonised legal regulation in this area could contribute to effectiveness of restructuring proceedings. Also, incentives to provide additional financing for financially distressed companies is beneficial and important.

Nevertheless, though pursuant to Recital 66–68 of the Directive it requires a fair balance between the protection of interests of providers of interim and new financing, the text of the Directive opens doors for discussions whether this balance is achieved. First, the regulation of interim and new financing in the Directives is rather vague. The Directive does not specify when interim and new financing should be provided and does not deal with the question how a debtor should use such additional financing. Second, though the Directive provides certain exceptions to protection of interim and new financing, it is not sufficient to achieve fair balance between the interests of all participants of restructuring proceedings. The authors argue that in order to ensure lawfulness of provision of interim and new financing, *ex ante* judicial control is mandatory.

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Problematic of Defining the Concept of the Beneficial Owner in Capital Companies, Associations and Foundations

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Abstract

This study is focused on the problematic of defining beneficial owners in three types of legal persons: capital companies, associations and foundations. In this regard, the issue of determining beneficial owners of foreign merchants through their branches and representative offices is also examined. The aim of this study is to provide well-reasoned arguments for necessitating a more solid elaboration of legal framework on the beneficial owners in Latvia. In order to achieve this aim, doctrinal methodology is applied by analysing legal norms on the definitions of beneficial owners of different legal subjects. Furthermore, the case study method is used to examine the state practice on registering beneficial owners. Additionally, analytical method and case-law method are also used to support the arguments. The findings of this study demonstrate that public register frequently contains information on beneficial owners which is not entirely accurate and the inconsistent interpretation of the rules on defining the concept of the beneficial owner is due to their incompleteness and rather general nature.

Keywords: associations, beneficial owners, capital companies, foreign merchants, foundations, representative offices.

Introduction

The contemporary world is experiencing the emergence of novel trends in the realm of money laundering, proliferation and financing of terrorism. Given the rapid growth of transaction volumes, the number of newly founded companies and complexity of finance-related crimes, reliance on traditional methods of detecting a breach of law

is gradually becoming inefficient.[1] It follows that new legal responses stemming from new legal rules are necessary for tackling not only the breaches but also circumventions of laws which result in a loss for economy of a nation. During the last decade, one of the most worrisome trends has been the concealing of beneficial owners through the opacity of corporate vehicles which helps the respective individuals hide their identity, true purpose of their commercial activity and the source of income, as well as avoid taxation.[2] As a result, it has been a problem for the governments to elaborate a legal scheme which would be an effective tool in revealing beneficial owners.

Issues related to revealing of beneficial owners are becoming increasingly important in the legal framework of Latvia as well. In order to become a more entrepreneurially competitive country on the global stage, Latvia had an obligation to adopt drastic amendments to its anti-money laundering (hereinafter – AML) regulation. One such change involved ensuring complete transparency of legal persons, so as to disassociate Latvia with the concept of a high-risk jurisdiction.[3] Although the newly adopted requirement to disclose beneficial owners is considered an effective tool for financial supervision and corporate transparency, the concept of the beneficial owner is not unambiguously defined in Latvian laws. However, a clear understanding of the concept of beneficial owner is the first step in identifying the natural person exercising control over a legal person and further imputing liability for breaches of laws on that person. Thus, the aim of this study is to substantiate the necessity of clarification of Latvian legal rules on defining beneficial owners and the practical application thereof.

The study examines the three most common types of legal entities in Latvia, which tend to be participants in each other: capital companies, associations and foundations. In addition, the issue of defining the beneficial owners of foreign merchants is also considered, taking into account the recently adopted legal requirement for the branches and representations of foreign merchants to submit information on their beneficial owners, for the failure of which they are excluded from the commercial register. The overall methodological approach of this study is the doctrinal methodology, since primarily doctrinal analysis of legal norms is applied to the aforementioned types of legal entities, the definitions of beneficial owners of which are examined and analysed by elements. Furthermore, analytical and case-law method are also used to process information from scholarly papers and jurisprudence of the court. In addition, the case study method is

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[1] Monroe, B. (2020). Special contributor report: Top 5 Emerging Trends for AML Compliance: Dawn of a New Decade 2021! *acfcs.org*. https://www.acfcs.org/special-contributor-report-top-5-emerging-trends-for-aml-compliance-dawn-of-a-new-decade-2021/

[2] By the editors. (2016). What's a Beneficial Owner for a Company and Why Does it Matter? *dnb.co.uk*. https://www.dnb.co.uk/perspectives/corporate-compliance/what-is-beneficial-owner-company-why-does-it-matter.html

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used for practical examples from the information recorded in the public database of the commercial register to analyse whether the definition of the beneficial owner in practice achieves the objective of the legal framework – to identify the natural person exercising actual control.

Defining the Beneficial Owner in Capital Companies

First and foremost, it is essential to examine the problematic of defining the beneficial owner in capital companies, since the latter are to be considered legal entities of the highest risk. The aforementioned assertion is substantiated by the recently adopted Amendments to the Law on the Prevention of Money Laundering and Terrorism Financing (hereinafter – the Amendments), which in the transitional provision No. 49 envisage that the Register of Enterprises of the Republic of Latvia (hereinafter – the Register) as the authority responsible for maintaining the commercial register shall terminate the activity of those capital companies which have failed to submit information on their beneficial owners.[4] Although such legal measure *prima facie* leaves no doubt as to the corporate transparency to be attained as the primary goal, it is nevertheless disputable whether transparency guarantees that the public register contains only true and accurate information on beneficial owners.

Surprisingly enough, the concept of the beneficial owner is defined in one normative act only – the Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing (hereinafter the AML law). According to the Clause 5 of Section 1 of this law, the beneficial owner in a general sense is "a natural person who is the owner of the customer – legal person – or who controls the customer, or on whose behalf, for whose benefit or in whose interests business relationship is being established or an individual transaction is being executed".[5] With that general framework, the definition is further specified in sub-clauses a and b with regard to legal persons and legal arrangements respectively. As regards the former, which include capital companies as well, the beneficial owner is "a natural person who owns, in the form of direct or indirect shareholding, more than 25 per cent of the capital shares or voting stock of the legal person or who directly or indirectly controls it".[6]

The legal definition of the beneficial owner in capital companies *prima facie* seems clear and exhaustive. More precisely, one can infer that the legal presumption of the beneficial owner is that it equates to the notion of a shareholder or stockholder in a capital company. Indeed, as it stems from the first part of Section 136 of the Commercial Law,

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[4] Amendments to the Law on the Prevention of Money Laundering and Terrorism Financing. *Latvijas Vēstnesis. 129*, 28.06.2019.

[5] Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing. *Latvijas Vēstnesis. 116*, 28.08.2008.

[6] *Ibid.*

"the shareholder is a person who has been entered in the register of shareholders (stockholders), if it has not been otherwise specified in the law".[7] Hence, in a straightforward situation a natural person who is entered in the register of shareholders (stockholders) and according to it holds more than 25 % of the capital shares is undoubtedly considered to be the beneficial owner. Indeed, as follows from the example of SIA "Embo grupa" – a limited liability company of a sole shareholder – the beneficial owner is the natural person holding 100 % of the shares.[8] Another situation which leaves relatively no doubt as to the determination of the beneficial owner is a company where the control is exercised on the basis of an ownership right. In that case, the person who indirectly holds more than 25 % of the shares through an intermediary legal person is to be considered the beneficial owner. An illustrative example of the aforementioned is SIA "Profs nekustamie īpašumi Valmiera" – a limited liability company with two beneficial owners each exercising control as indirect shareholders through another company that is the sole shareholder of the company in question.[9] Thus, it can be concluded that the first part of the legal definition that includes direct and indirect shareholding is the least ambiguous part.

However, it should be noted that the previously analysed direct or indirect shareholding is only one of the forms of the exercised control. The other part of the legal definition puts forward the concept of direct or indirect control which is not further clarified neither in the AML law, nor in any other legal act. In this regard, the Supreme Court of the Republic of Latvia has put forward an interesting conclusion, namely that the entry in the register of shareholders only guarantees that a shareholder may exercise his/her voting rights. Nevertheless, a property right to those shares may belong to another person, e.g. when the shareholder holds the shares for the benefit of that other person. Thus, the status of the beneficial owner does not necessarily always coincide with that of the shareholder.[10]

Whilst the conclusion of the court does not deny the examples analysed in relation to the direct and indirect shareholding, it does clearly imply that different kinds of control in a capital company are possible. Legal scholars have also made a similar conclusion that most of the national legal systems identify beneficial owners only through the first-layer shareholders, i.e. direct shareholders of a capital company who participate and vote in general meetings. However, it is highly complicated to trace beneficial owners

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[7] Commercial Law. *Latvijas Vēstnesis. 158/160*, 04.05.2000.; *Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs. 11*, 01.06.2000.

[8] Sabiedrība ar ierobežotu atbildību "Embo grupa". (2021). *info.ur.gov.lv.* https://info.ur.gov.lv/#/legal-entity/40103297869

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[10] Decision No. SKC 266/2018 of the Department of Civil Matters of the Supreme Court of the Republic of Latvia (28.11.2018). *at.gov.lv.* https://at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/komerctiesibas/komercsabiedribas-dalibnieka-biedra-statuss

through multi-level corporate governance structures, i.e. through second or subsequent layer which contains intermediaries holding shares as nominees and final layer which contains the end-investor or the ultimate beneficial owner.[11] Thus, it should be admitted that types of direct or indirect control are of an unlimited kind and it indeed may be nearly impossible to detect the beneficial owner through certain excessively complex control schemes.

There are examples available in the public register that give a general insight into the wide spectrum of possible types of control exercised by the beneficial owner. For instance, in SIA "ITEKTRANS" there are three beneficial owners who exercise control as co-heirs on the basis of a property right to the shares. This example is relevant for analysis because it demonstrates that although the three persons have been entered in the register of shareholders, they do not qualify as three separate shareholders but as a sole shareholder, since they hold the shares as co-heirs.[12] In essence, the beneficial owners of SIA "ITEKTRANS" in a way reflect the previously mentioned court's conclusion that a shareholder may not always exercise control of direct or indirect shareholding in the capital company. Although in this case the co-heirs are both entered into the register of shareholders and registered as beneficial owners at the same time, the fact of their entry in the register of shareholders does not automatically mean that the registered type of control is the most straightforward, i.e. direct or indirect shareholding.

Interestingly enough, the aforementioned example does not demonstrate the most confusing case of determining the beneficial owner. Similarly confusing is the practice of determining beneficial owners in case there are four shareholders in the capital company holding exactly 25 % of the shares each. From the grammatical interpretation of legal definition put forward in the AML law it would seem that the threshold is set above 25 % and leaves no doubt that natural persons holding 25 % or less are not to be considered beneficial persons. Indeed, this general beneficial ownership rule even stems from the European Union (hereinafter – EU) law. More specifically, Directive (EU) 2015/849 dealing with AML issues states in Article 4(6)(a)(i) that "a shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership".[13] Thus, although rules on

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[11] Vermeulen, E. P. M. (2013). Beneficial Ownership and Control: A Comparative Study – Disclosure, Information and Enforcement. *OECD Corporate Governance Working Papers. 7*, pp. 21–22. *oecd-ilibrary.org*. https://www.oecd-ilibrary.org/docserver/5k4dkhwckbzv-en.pdf?expires=1622205585&id=id&accname=guest&checksum=EAFCF5E569983F573A8CBC90FE1AFF30

[12] Sabiedrība ar ierobežotu atbildību "ITEKTRANS". (2021). *info.ur.gov.lv*. https://info.ur.gov.lv/#/legal-entity/54103040781

[13] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. *Official Journal of the European Union. 141*, 05.06.2015.

defining the concept of beneficial owner should at least within the framework of wording adopted by the EU be harmonised throughout the EU Member States, some scholarly research suggests that different regulatory approaches are being adopted therein. In fact, occasionally definitions of the beneficial owner include the natural person who exercises 25 % or greater equity interest or voting rights in the capital company[14] which essentially means that the threshold is practically being lowered to include the exact number of 25 % as well.

It is peculiar that in practice, the definition set out in the AML law in Latvia is interpreted differently as well. Thus, for instance, SIA "EXPRESS LINE" has four beneficial owners registered who exercise control as shareholders and hold exactly 25 % of the shares each.[15] On the contrary, in case of SIA "TRITONE STUDIO" there are also four shareholders holding 25 % of the shares each but a notice is entered in the public register that it is impossible to detect the beneficial owner of that legal person.[16] Although the AML law expressly puts the threshold above 25 %, it is unclear as to why the practice of registering beneficial owners differs with respect to two legally identical situations. Undoubtedly, such variety of interpretation of a single legal definition does not contribute to the overall public reliability of the registered information on beneficial owners and even makes the definition of the beneficial owner more unclear.

Certain examples from the public register illustrate another confusing case, namely when there are multiple types of control that a single beneficial owner exercises.[17] For instance, SIA "TEDxRiga konferences" exemplifies that a capital company where the single shareholder is an association can have a beneficial owner who exercises three types of control: as a member of the association, as a member of the executive institution of the association and as the member of the executive institution of the capital company itself. This case leads to a conclusion that there the type of control is a concept practically subject to free interpretation and there are nearly no limits as to what can be registered as a type of control that the beneficial owner exercises. Nevertheless, as confusing and ambiguous as it may seem, one may hardly argue that such interpretation is contrary to the aim of the AML law because no specific types of control are listed therein. Additionally, the case of SIA "TEDxRiga konferences" raises the next relevant issue to be analysed – that of defining the beneficial owners in associations and foundations which have certain legal peculiarities of their own.

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[14] Troy, K. J., Rowland, S. (2019). Do You Really Know Who is in Control? Why Beneficial Ownership Transparency Matters, p. 3. *refinitiv.com*. https://www.refinitiv.com/content/dam/marketing/en_us/documents/white-papers/ubo-do-you-really-know-who-is-in-control.pdf

[15] Sabiedrība ar ierobežotu atbildību "EXPRESS LINE". (2021). *info.ur.gov.lv*. https://info.ur.gov.lv/#/legal-entity/40003653522

[16] Sabiedrība ar ierobežotu atbildību "TRITONE STUDIO". (2021). *info.ur.gov.lv*. https://info.ur.gov.lv/#/legal-entity/40103222224

[17] Sabiedrība ar ierobežotu atbildību "TEDxRiga konferences". (2021). *info.ur.gov.lv*. https://info.ur.gov.lv/#/legal-entity/40103898681

Peculiarities of Beneficial Ownership in Associations and Foundations

The general obligation to disclose beneficial owners according to Section 18.2 of the AML law applies to any legal person registered in the public register[18] without a specific distinction of capital companies as higher risk subjects. The reason why this obligation is applicable in the same manner to associations and foundations is not quite clear, since the nature of the respective legal persons cardinally differs from that of capital companies. According to the first part of Section 2 of the Associations and Foundations Law, "an association is a voluntary union of persons founded to achieve the goal specified in the articles of association, which shall not have a profit-making nature".[19] Given the non-profit making nature, it may be questioned how necessary it is to demand on a mandatory legislative basis for the associations to reveal their beneficial owners. Similarly, according to the second part of the aforementioned legal norm, "a foundation, also a fund, is an aggregate of property that has been set aside for the achievement of a goal specified by the founder, which shall not have a profit-making nature".[20] Hence, the beneficial ownership issues of associations and foundations should be analysed together.

Commencing the analysis on how to define the beneficial owner in associations or foundations, it is important to understand at first whether such legal persons have beneficial owners at all. As follows from the previously cited norms of the Associations and Foundations Law, these legal persons are founded for attainment of a specific goal and their activity does not primarily touch commercial aspects. Hence, it is useful to take a glance at the explanation provided by the Register on who should be regarded as the beneficial owner in these two specific types of legal persons. The state authority explains with respect to associations that if an association has a large number of members who work altogether towards the achievement of the goal set forward in the association's statutes, it is deemed to be impossible to detect such association's beneficial owner. However, the situation is different when there is a specific natural person who actually controls the association or for the benefit of whom the association primarily exercises its activity, or when the actual activity of the association is performed by some member(s) of the executive institution.[21] Unsurprisingly, no separate explanation is provided as to the beneficial owners of the foundations, since it would be complicated to understand how an aggregate of property allocated for a non-profit goal can have a beneficial owner.

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[18] Supra note 5.

[19] Associations and Foundations Law. *Latvijas Vēstnesis. 161*, 14.11.2003.; *Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs. 23*, 11.12.2003.

[20] *Ibid*.

[21] Registration of an association (2021). *ur.gov.lv.* https://www.ur.gov.lv/en/register/organization/association/founding/registration-with-the-enterprise-register/beneficial-owners/

In sum, it follows that the problematic of defining the beneficial owner in associations and foundations falls within the ambiguous and open-ended part of the legal definition set out in the AML law, i.e. that the natural person exercising any type of control (even not specifically mentioned in law) shall be considered the beneficial owner. Nevertheless, it follows from the explanation provided by the Register that such cases are rather an exception and *a priori* it is impossible to determine the beneficial owner of an association or foundation. Indeed, the second part of Section 18.2 of the AML law provides that "[..] if the legal person has exhausted all the means of determination and has concluded that it is not possible to determine any natural person – beneficial owner within the meaning of Section 1, Clause 5 of this Law -, as well as the doubts that the legal person has a beneficial owner have been excluded, the applicant shall certify it in the application, indicating the justification".[22]

In short, the AML law obliges to submit for registration a notice, whereby it is impossible to determine the beneficial owner for all legal persons, even associations and foundations. Respectively, an unsatisfying conclusion arises that the beneficial owner in associations and foundations is an even more vague concept than in capital companies and subject to nearly entirely free interpretation. Since the wording of laws does not shed much clarity on the issue, it is necessary to look at the state practice of registering beneficial owners of associations and foundations in the public register.

First and foremost, it is useful to look at the case of association TEDxRiga which is a shareholder in the previously analysed SIA "TEDxRiga konferences". It can be seen from the public register that there is no information regarding the beneficial owners of this association registered at all.[23] In other words, neither a notice on the impossibility to determine the association's beneficial owners, nor any actual beneficial owner is registered with respect to this association. On the one hand, lack of information on its beneficial owners hardly seems illogical because the AML law does not provide any sanction for the failure of legal persons to submit information on their beneficial owners, except for capital companies, the activity of which may be terminated. On the other hand, however, the information registered on the beneficial owners of SIA "TEDxRiga konferences" suggests that there is one natural person exercising control as the association's TEDxRiga member. Hence, it is unclear why in the presence of one specific member exercising actual control the respective information is not registered with respect to the association TEDxRiga.

From the previously mentioned case, it appears that the information registered in the public register may at times be incomplete and to a certain extent even contradictory. Given that the Register does not have the right to terminate association's or foundation's activity for the failure to provide information on its beneficial owners, it is frequently the case that no information is registered at all. However, the confusing cases are not

[22] Supra note 5.

[23] TEDxRiga. (2021). *info.ur.gov.lv.* https://info.ur.gov.lv/#/legal-entity/40008215519

limited to the previously analysed one. The AML law contains an interesting rule on determining the beneficial owner during the due diligence procedure to be performed by the subjects of AML law –namely, credit and financial institutions, outsource accountants, auditors and other subjects listed in Section 3 of the AML law.[24] The rule is reflected in the seventh part of Section 18 of the AML law: "the subject of the Law, by duly justifying and documenting the activities performed to determine the beneficial owner, may consider that the beneficial owner of a legal person or a legal arrangement is a person holding the position in the senior management body of such legal person or legal arrangement, if all the means of determination have been exhausted and it is not possible to determine any natural person – beneficial owner – within the meaning of Section 1, Clause 5 of this Law, as well as the doubts that the legal person or legal arrangement has another beneficial owner have been excluded".[25] Essentially, this means that to the procedure performed by the subjects of AML law impossibility to determine the beneficial owner does not apply, but a presumption of a member of executive institution as the beneficial owner applies instead.

In this regard, the case of the foundation "Nodibinājums Audeo" is worth mentioning. It can be seen from the public register that there are three members of the executive institution who have also been registered as beneficial owners exercising control as members of the executive institution of the foundation.[26] While *prima facie* it does not contradict the rules set out in the AML law, it is confusing why the Register applies the rule of the seventh part of Section 18 of the AML law, the scope of which is clearly confined to the subject of AML law only, not the registering state authority.

Overall, it can be concluded that the problematic of defining the beneficial owner in associations and foundations is much more complex than in capital companies, since the vagueness of legal rules on this issue makes elaboration of a practical methodology for determining the beneficial owner practically inexistent. This leaves food for thought as to how the existing legal regulation could be improved and supplemented with more detailed rules. By the same token, for the state practice on registration to be precise and consistent, a solid legal framework on the issue of beneficial owners is required.

Disclosure of Beneficial Owners of Foreign Merchants through Their Branches and Representative Offices

Apart from the rules on beneficial owners of capital companies, associations and foundations, lately certain provisions from the Amendments have come into force which brings up another relevant issue in defining the beneficial owner, this time with respect to foreign merchants. It is stated in annotation to the Amendments adopted on 13 June

[24] Supra note 5.
[25] *Ibid*.
[26] "Nodibinājums Audeo". (2021). *info.ur.gov.lv*. https://info.ur.gov.lv/#/legal-entity/40008093564

2019 and in force from 29 June 2019 that there is a need for trusts and other legal arrangements not recognised in Latvia, as well as foreign merchants as such to reveal their beneficial owners. Such aim shall be attained by imposing an obligation on the branches and representative offices to submit information on beneficial owners of foreign merchants thereof within a transitional period of six months.[27] In case of failure to fulfil the aforementioned obligation "[..] the Register shall exclude the branches registered thereby from the commercial register"[28] according to the transitional provision No. 47 of the AML law. The same rule is mirrored with respect to the representative offices in the transitional provision No. 48 of the AML law.[29]

Interestingly enough, from the grammatical interpretation of Section 18.2 of the AML law, it stems that the obligation to disclose beneficial owners applies to legal persons only. However, according to the first part of Section 22 of the Commercial Law "a branch is an organisationally independent part of an undertaking, which is territorially or otherwise separated from the principle undertaking and at the location of which commercial activities are systematically performed in the name of the merchant".[30] It follows from the definition that branch is not even a legal person, rather an aggregate of property. Similarly, as regards representative offices, it is stated in the eighth part "[..] a representative office is not a legal person, and it does not have the right to conduct commercial activities in Latvia".[31] In sum, it is peculiar that transitional provisions No. 47 and 48 of the AML law factually widen the scope of Section 18.2 of the AML law to subjects which are non-legal units of foreign merchants. It has to be understood that branches and representative offices *per se* may not have a beneficial owner. The obligation to reveal those applies indirectly to the foreign merchants as legal persons.

While it cannot be doubted that termination of activity or exclusion from the commercial register are effective tools in ensuring complete transparency of legal persons, it is disputable whether the notion of beneficial owners of foreign merchants coincides with the legal definition of the beneficial owner in force in Latvia. Thus, for instance the branch Plastic Card Enterprise (Baltijas filiāle) has four natural persons registered as beneficial owners who exercise control in the branch on the basis of an ownership right through the foreign merchant. In addition, it is visible that all of these four persons are of Ukrainian nationality and the foreign merchant itself is also registered in Ukraine.[32]

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[27] Bill Amendments to the Law on the Prevention of Money Laundering and Terrorism Financing (2019). *saeima.lv*. http://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/4BB13AB66D7D4F19C22583D10052D381?OpenDocument

[28] Supra note 5.

[29] *Ibid.*

[30] Supra note 7.

[31] *Ibid.*

[32] Plastic Card Enterprise (Baltijas filiāle). (2021). *info.ur.gov.lv*. https://info.ur.gov.lv/#/legal-entity/40203242693

However, the AML law provides that only persons with more than 25 % of the shares qualify as beneficial owners in Latvia which at least formally means that on the basis of an ownership right no more than three natural persons may be registered as beneficial owners. Respectively, for determination of the beneficial owners of the foreign merchant, Ukrainian law applies and in Latvia, those beneficial owners are not determined but only disclosed. Therefore, it can be argued that information registered in the public register in Latvia on the beneficial owners of foreign merchants actually reflects the rules on beneficial owners in force in that specific foreign country rather than in Latvia.

Conclusions

Overall, this study has provided an insight into peculiarities of legal definitions of the beneficial owner in different legal subjects and state practice in registering beneficial owners. Additionally, the compatibility of state practice with the original legal rules has been evaluated. Thus, two major conclusions stem from the study: first, legal framework on defining the beneficial owner is insufficiently detailed and precise which leads to the peril of interpretation that might not be in line with the aim of the AML law; second, state practice in registering beneficial owners may at times be inconsistent given the insufficiently precise definition of the beneficial owner set out in law.

Hence, the aim of this study is deemed to be achieved – the arguments analysed above indeed substantiate the necessity of clarification of legal rules on defining beneficial owners which would result in a more consistent state practice and a greater accuracy and precision of the information registered in the public register. A possible solution for elaborating legal framework on the issue would be a more detailed definition of the beneficial owner. The case-studies examined with respect to capital companies, associations, foundations and foreign merchants all illustrate that the most crucial problem is determining the beneficial owner by the type of control they exercise. To resolve this, the definition set out in the AML law may be supplemented by listing specific types of control that the beneficial owner may exercise. While it is indeed unfeasible to envisage all the possible of control, listing at least the most typical ones would help to determine exactly who the beneficial owner of a legal person is and pinpoint precisely the type of control they exercise, and which is the exact factor for the natural person to qualify as the beneficial owner, thus avoiding the situation where an applicant lists all the possible relations the beneficial owner may have to the legal person.

Moreover, the state practice on registering beneficial owners should be clarified as well. While, its precision largely depends on the clarity and sufficiency of the legal framework, currently it would be useful at least to stick strictly to the existing rules. For instance, in cases when there are four natural persons holding exactly 25 % of shares in the legal person, it would be appropriate to register a notice that it is impossible to determine the beneficial owner. In other words, the current threshold of an ownership right above 25 % set out in the AML law should be strictly adhered to. In addition, regarding

associations and foundations, the practice to register members of the executive institution as beneficial owners should be revised, as from the wording of the AML law it follows that this presumption is not applicable to the Register as the competent authority. Lastly, the beneficial owners of foreign merchants should be registered in accordance with Latvian legal rules on beneficial owners, also considering the aforementioned about the threshold of above 25%.

Therefore, the current legal framework provides a solid beginning for understanding what a beneficial owner is. However, in order to attain accuracy and precision in the information provided by the applicants, the rules on beneficial owners require elaboration. The elaboration thereof should primarily be centred around the types of control exercised by the beneficial owner which *per se* is a separate matter of study.

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Notion of Patient Duties

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Abstract

A trend is emerging in the Latvian legal system to refer to patient duties more and more, thus consolidating the idea of patient duties. Deficiencies are found, however, in the interpretation of the idea of patient duties, which lacks consistent distinction from related notions.

Nowadays, not only is the attention to patient duties in the medical treatment relationship growing, but changes are also taking place which are directed at expanding the interpretation of patient duties, creating groundwork for new patient duties in medical treatment.

The aim of the research is to analyse the notion of patient duties, find deficiencies in its interpretation and propose specific solutions to improve the definition of patient duties. The following primary research methods have been used in the study: analytical, systemic, teleological.

The research results include an interpretation of the definition of patient duties, distinguishing it from related notions and analysing the trend of expanding the interpretation of patient duties. Based on this interpretation, a proposal is made for improvement of the laws and regulations.

Keywords: adherence, duty, expansion, notion, patient.

Introduction

There are two participants in the legal relationship in medical treatment, i.e., the medical professional or the medical institution and the patient, where each has a specific legal status. However, in legal discussions, emphasis is more often given to patient rights. On the one hand, there are justified significant arguments for actualisation of patient rights in the modern day – these include: the course of historical

development of the medical treatment relationship, where a natural increase of patient rights is observed in modern history; historical events related to medical treatment relationships (for example, medical experiments during WWII and the Nurnberg trials), setting a requirement for enhanced enforcement of patient rights; necessity to protect the patient as the weakest party in the legal system, already considering modern threats to the patient. However, effective treatment is in the interests of the patient's health, where proper cooperation of the participants of the legal relationship in medical treatment requires an equilibrium of their legal statuses – rights and duties for both participants of the treatment process, including the patient.

A trend is emerging in the Latvian legal system to refer to patient duties more frequently, thus consolidating the idea of patient duties. Deficiencies are found, however, in the interpretation of the idea of patient duties, which lacks consistent distinction from related notions. It is noteworthy that the idea of patient duties is currently at the initial stage of consolidation where its implementation is an issue that concerns the entire legal system – laws and regulations, legal practice, and legal science.

Society is dynamic rather than frozen, and social relationships are constantly developing. With the legal relationships in medical treatment becoming more complex, legal statuses of the participants of legal relationships in medical treatment are interpreted in more detail. This also results in changes in the interpretation of patient duties, including appearance of new and disputable sprouts of patient duties.

The research aim is to analyse definition of patient duties, find deficiencies in its interpretation and propose specific solutions to improve the definition of patient duties. The following primary research methods have been used in the study: analytical, systemic, teleological.

1 Distinction of Definition of Patient Duties from Related Notions

Three notions are used to denote patient duties – *duties* (Engst, 2008; Evans, 2007; Resnik, 2005; Löschke, 2017; Judicial Council of California, 2020), *responsibility* (Olsen, 2000; Kelley, 2005; Draper & Sorell, 2002; Buetow, 1998; Wilson, 1998; Smith Iltis & Rasmussen, 2005; Patient Rights Act, 2011; Health Charter of Rights and Responsibilities Act, Bill 60, 2003; Florida Patient's Bill of Rights and Responsibilities, Chapter 381, Section 381.026, 2020), and *obligations* (Gauthier, 2005; Waterbury, 2001; Sider & Clements, 1984; English, 2005; The Patient's Charter of Rights and Obligations, 2007). This raises the question whether the meaning of these notions is identical when these are equally attributed to patient duties.

First, a duty is a requirement for a person's action in relation to something or someone (Prabhat, 2018; Duty, 2021). Thus, a duty is a specific task where active personal action is emphasised. Second, responsibility is the ability to act in a justified and socially responsible manner, bringing such action to a successful result (Surbhi, 2019;

Prabhat, 2018; *Atbildība*, 2020; Williams, n.d.). By nature, responsibility is divided into legal and moral responsibility, which partially overlap (Williams, n.d.) although they have different determining factors – legal norm or morality, and different approach to their enforcement, where no universal enforcement of moral duty (Johnson & Cureton, 2019) exists. Nevertheless, responsibility, according to its direction, is divided into prospective and retrospective responsibility with different aims – everybody's future interests or satisfaction regarding past violation, and different measures applied – providing for a duty or imposing a punishment (Williams, n.d.). Thus, interpretation of responsibility has a wider scope than that of duty where emphasis is put on the result achievable through responsibility. Prospective responsibility, which is part of all responsibility, is related to interpretation of duty.

Two binding principles can be noted, which are applicable from responsibility to duties. First, nowadays, with the growing value of responsibility, responsibility promotes cooperation in people (Gauthier, 2005, *163*; Williams, n.d.), and thus performance of duties. Second, personal autonomy also means personal responsibility , which also means being responsible for performance of duties. Thus, the idea of patient duties is consolidated by the growing value of responsibility where patient duties are derived from patient autonomy. It can be concluded that responsibility differs from duties in its scope, nature and direction, whereas duties are part of the notion of responsibility.

Furthermore, obligation is a legal relationship where one person (the debtor) has to perform some action for the benefit of another person (the creditor) (in Roman law, the object of obligation is to give, perform or answer), which has material value; whereas the other person has the right to demand the performance (*Civillikums*, 1937, 1401. p.; Torgāns, 2018, *19*; *Latvijas Republikas Civillikuma komentāri*, 1998, *16*; Čakste, 2011, *130*; *Obligation*, 2020). From the definition of obligation it follows that it cannot be equated with patient duties for the following reasons: a) patient duties are not performed only for the benefit of the medical professional; b) patient duties are difficult to evaluate in a material equivalent; c) in the legal relationship in medical treatment, the patient is the creditor rather than the debtor, considering their legal status in medical treatment; d) the scope of obligation is wider than the meaning of duty. Thus, duty, responsibility, and obligation are, on the one hand, different and separate notions according to scope and essential features; on the other hand, these are related and mutually dependent notions which include each other. Only the notion of duty is appropriate to the patient.

2 Limits of Notion of Patient Duty and Patient Adherence

The term *adherence* (Latvian: *līdzestība*) has been introduced in the Latvian legal terminology. An opinion has been expressed in the legal practice that a patient lacks adherence if they are not fulfilling patient duties (*Administratīvā rajona tiesa*, 2019, 12. pk.). This raises the question whether the meaning of patient adherence is identical to patient duties. Thus, its meaning and limits need to be clarified.

Adherence is defined as a long-term, dynamic, complex, and coordinated process, which is directed at cooperation between medical treatment participants with equal rights where the patient is informed, determined, and persistent (Bortaščenoks, Millere & Mārtinsone, 2018, *139*). Three terms with different meanings are used in the English language to denote adherence – *compliance* (*complire* (Latin) – to fulfil a promise) – action according to advice; *concordance* – the patient and the adviser agree on the regimen to be fulfilled by the patient where the patient has to take greater responsibility; *adherence* (*adhaerere* (Latin) – keep close to) – the patient is an active participant in their treatment together with the medical professional (Aronson, 2007, *383*; World Health Organization, 2003, *3, 4*). It is stated that adherence is revealed in the Latvian system of laws and regulations primarily with the meaning of *compliance* (Bortaščenoks, Millere & Mārtinsone, 2018, *139*) , which cannot be agreed to. Although laws and regulations have their faults, still adherence is more appropriately described using the meaning of adherence, where medical treatment is performed with the consent of the patient as an active and equal participant.

Adherence is explained as existence close to illness (Stūre, 2019), which is arguable for the following reasons. First, existence does not mean that the person is taking active action (*Latvijas Zinātņu akadēmija*, 2003), where adherence is more appropriately described as patient participation which is characteristic of an equal participant. Moreover, participation means fulfilment of duties as well as exercising of rights. Second, there is no ground to describe adherence in a narrow sense, only applying it to *close to illness*, i.e., the treatment period where the goal of adherence is the patient's health – *close to health*, i.e., beyond treatment as well, for example, correcting a lifestyle and keeping to it (Mārtinsone, 2020; Valdmane, 2018). Thus, patient duties are only a part of patient adherence, which is directed at participation *in cooperation to health*.

Traditionally, patient adherence is related to the relationship between the patient and the medical professional. However, such a participant as the pharmacist is also involved in medical treatment, and their importance in medical treatment has already been emphasised as early as the Middle Ages (Baltiņš, 1999, *5, 6*). Some groundwork has been found for inclusion of the pharmacist in the meaning of patient adherence. Considering that patient adherence is related to patient health, rather than only medical treatment in its narrow sense, patient adherence needs to be evaluated in the legal relationship of the patient, medical professional, and pharmacist.

Thus, patient adherence means actions of the patient when performing their duties and exercising their rights, with the primary goal of these actions being to preserve and improve the patient's health and which the patient performs both during treatment in the legal relationship of the patient, medical professional or medical institution, and the pharmacist, as well as beyond patient treatment.

3 Future Prospects of Interpretation of Patient Duties

Nowadays, changes are taking place which are directed at expanding the interpretation of patient duties. Ever-growing attention in the medical treatment relationship is given to patient duties in order to find in this relationship a more appropriate balance of legal statuses of the parties, whereas former centring of the medical treatment relationship put more emphasis on patient rights. Changes are also taking place in the medical treatment relationship itself, which is becoming more nuanced, resulting in the necessity to review legal statuses of the parties, including patient duties. Emphasis is changing in the legal system too where its interacting principles are wavering, also affecting patient duties in the medical treatment relationship. Thus, the following directions are emerging for the expansion of the interpretation of patient duties.

First, with the eternal discussion in the legal system on the priority of public or private interests where the solution to the situation does not support either constant preponderance of altruism over egoism or its uniform solution (Petman, 2008, *121, 131*); thus, the idea of collective responsibility in society is emphasised again (Williams, n.d.; Martin, Williams, Haskard & DiMatteo, 2005, *193*) while also discussing new patient duties. For example, if the patient receives healthcare services funded by the State or mandatory health insurance, for the benefit of the future generation it is suggested to introduce the duty to participate in clinical trials and the duty to participate in the clinical training process (Evans, 2004, *198, 202*; Veatch, 1984, *48*; Waterbury, 2001, *286–294*; World Health Organization, 1994, *Introduction*). This suggestion currently lacks critical evaluation of arguments. For example, it is stated that by participating in a clinical trial, the patient is going to receive some treatment anyway (Evans, 2004, *201*). However, a clinical trial can have a placebo group which does not receive treatment, which is important if a patient with health disorders requiring treatment is participating in the trial. It is also stated that participation in a clinical trial is a good opportunity for patients with a limited ability to pay (Waterbury, 2001). However, without proper legal protection of the patient, there is always a risk that a patient in such a financial situation is actually influenced to choose to participate in the training where there is a historical experience with a system being intentionally created, providing for the requirement in the education of doctors in the Middle Ages for additional one-year practical training outside the city (Zudgof, 1999, *58, 59*) where representatives of the lowest social strata prevailed. Thus, by introducing patient duties for the benefit of public interests, appropriate legal protection for the patient during the fulfilment of such duties has to be considered.

Second, expanding compulsory patient treatment for social purposes is being discussed (Kennedy, 1994, *234*; Kennedy, Grubb, 1998, *118*), providing for an additional case when the patient must receive treatment. Currently such groundwork for expansion of patient duty is found for the benefit of a conceived person. This suggestion is explained by the growth of the value of a person in the modern legal system since their conception regardless of their stage of development or life (Vebers, 1964; Bērnu tiesību konvencija,

1989, Preambula; Schulman, 2013, *11, 12*), as well as by wellbeing and safety interests of society for reproduction and existence.

Third, emphasis is now wavering in the establishment of the medical treatment relationship, specifying the principles for expression of the patient's will, which show the necessity of patient duty. On the one hand, patients currently have the right to receive information, as well as the right to refuse to receive it (*Pacientu tiesību likums*, 4. p. 1. d., 6. p. 1. d.; 4. p. 8. d.) regardless of the form of the expression of will, with no duty for the patient to receive information. Groundwork is found for such a patient duty in case of a significant threat to or invasion of public interests.

However, considering that the patient has to be informed in the expression of their will (*Pacientu tiesību likums*, 6. p. 1. d, 6. p. 5. d.), there are doubts whether it is possible to make a decision if there is no information. This is why the patient duty to receive information before making a medical treatment decision needs to be considered. On the other hand, a collision of circumstances is observed when, based on objective information, the patient has the right to take a subjective decision, which is not always for the benefit of the patient's health (McLean, 2009, *24, 27, 33–35*). More appropriate for the medical treatment relationship in the near future is the requirement for the patient duty to make a decision which is objectively justified by health interests of the patient. Establishing such patient duties encourages in the patient the duty to be responsible in the medical treatment relationship and to take responsibility for their health.

Fourth, there are discussions about the expansion of the legal basis for disclosing confidential patient information in a reasonable amount for the benefit of significant private interests of third parties, providing for a new patient duty. Information about a person's genes belongs to the private sphere; however, it is not individual by nature; this is why it is debatable whether patients must disclose information to relatives who are reasonably, often even vitally interested in knowing it (Mežinsk, 2006, *155*; Pattinson, 2006, *390*), for example, to prevent a severe congenital disorder.

Fifth, new and unprecedented situations in society help discover deficiencies in social relationships and find the most appropriate solutions, which can also manifest as a development of a new patient duty. The challenges caused by the spread of the pandemic actualise the evaluation of communication quality between the patient and the medical professional, revealing that under the influence of these circumstances 81 % of patients lie or hide information from medical professionals, creating the requirement for the patient to be honest (Soraya & Kid, 2020). The duty of the patient to provide information (*Pacientu tiesību likums*, 15. p. 2. d, 15. p. 4. d.) presumes that this information must be true and as complete as possible, thus also including the duty of the patient to be honest in providing information. Providing for a separate duty for patients to be honest would duplicate the existing normative regulation, which is not supportable. However, it needs to be evaluated whether honesty as a separate criterion needs to be emphasised in the patient duty to provide information, which would improve the medical treatment relationship.

Conclusions

1. Three notions are used in normative regulations, in the legal practice and in the legal science to denote patient duties – duties, responsibility, and obligations. However, the meaning of these notions is not identical. On the one hand, duty, responsibility, and obligations are different and separate notions according to scope and essential features. On the other hand, however, these are related and mutually dependent notions, which include each other. Moreover, only the notion of duty corresponds to the specific task of a patient.
2. The term *adherence* (Latvian: *līdzestība*) has been introduced in the Latvian legal terminology. However, its usage and interpretation in the legal system and in the medical practice does not really correspond to the idea of the notion of adherence. This can be explained as follows. First, patient adherence in its meaning is equated with patient duties. And second, the notion of patient adherence is used in a narrow sense and does not cover significant features of adherence. Thus, adherence is definable as the patient's actions when fulfilling their duties and exercising their rights, with the primary goal of these actions being to preserve and improve the patient's health and which the patient performs both during treatment in the legal relationship of the patient, medical professional or medical institution, and the pharmacist, as well as beyond patient treatment.
   It has been proposed to add Section 14^1 to the Law on the Rights of Patients and formulate it as follows:
   "Section 14^1. Patient adherence
   Patient adherence means the patient's actions when fulfilling their duties and exercising their rights with the goal to preserve and improve the patient's health, which the patient performs both during treatment in the legal relationship of the patient, medical professional or medical institution, and the pharmacist, as well as beyond patient treatment."
3. Nowadays, not only is ever-growing attention in the medical treatment relationship given to patient duties, but changes are also taking place which are directed at expanding the interpretation of patient duties, creating groundwork for new patient duties in medical treatment. This direction of change can be explained as follows. First, a desire is observed to find in the legal relationship in medical treatment a more appropriate balance of legal statuses of the parties, whereas former centring of the medical treatment relationship put more emphasis on patient rights. Second, changes are also taking place in the medical treatment relationship itself, which is becoming more nuanced, resulting in the necessity to review the legal statuses of the parties, including patient duties. And third, emphasis is changing in the legal system too where its interacting principles are wavering, also affecting the understanding of patient duties in the medical treatment relationship. Thus, regular reviewing of patient duties and its actualisation is encouraged with the purpose of improving the medical treatment relationship.

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Pacienta tiesības saņemt pārrobežu veselības aprūpes pakalpojumu, ja pacienta piederības dalībvalstī ir pieejama efektīva stacionārā ārstēšana, taču izmantotā ārstēšanas metode neatbilst pacienta reliģiskajai pārliecībai

Patient's Right to Cross-border Healthcare when Effective Hospital Treatment Is Available in Patient's Member State but Method of Treatment Used Is Against Patient's Religious Beliefs

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Abstract

In October 29th, 2020, the Court of Justice of the European Union delivered a judgment in case *A. vs Ministry of Health*, No C-243/19. The Court in the judgment analysed significant legal issues relevant to Latvia. Therefore, the aim of the article is to analyse the main proceedings about the patient's right to cross-border healthcare when effective hospital treatment is available in the patient's Member State but the method of treatment used is against the patient's religious beliefs. The article also aims to analyse whether the principle of objective investigation and prohibition of legal obstruction by institutions and courts in accordance with Administrative Procedure Law have been obeyed.

In the article, European Union and national legal framework and scientific literature in the field of patient's right to receive cross-border healthcare have been analysed. Facts of main proceedings in national court cases and request to Court of Justice of the European Union for preliminary ruling from the Senate of the Supreme Court of the Republic of Latvia have been studied as well. Next, the Advocate General Gerard Hogan's opinion and judgment of the Court of Justice of the European Union has been analysed. Further, the judgement of the Senate of the Supreme Court of the Republic of Latvia has been

investigated. Upon concluding the article, the author draws attention to certain issues of national court's legal analysis, which could be incompatible with the principle of objective investigation and prohibition of legal obstruction by institutions and courts.

Keywords: cross-border healthcare, freedom of religion, Jehovah's Witnesses, patient, principle of objective investigation, prohibition of legal obstruction by institutions and courts.

Ievads

Eiropas Savienības Tiesa 2020. gada 29. oktobrī pasludināja spriedumu lietā *A. pret Veselības ministriju*, Nr. C-243/19, pamatojoties uz to, ka Augstākās tiesas Senāts lūdza sniegt prejudiciālu nolēmumu par administratīvajā lietā Nr. A420281216 pastāvošo strīdu par to, vai ir leģitīms Latvijas iestāžu un tiesu atteikums piešķirt iepriekšēju atļauju pārrobežu veselības aprūpes izdevumu atmaksāšanai tad, ja Latvijā ir pieejama efektīva stacionārā ārstēšana, taču izmantotā ārstēšanas metode neatbilst pacienta reliģiskajai pārliecībai, un vai tas nerada atšķirīgu attieksmi, kas netieši balstīta uz pacienta reliģisko pārliecību (turpmāk – pamatlieta).

Rakstā tiek pētīts ES un nacionālais normatīvais regulējumus, kas attiecas uz pamatlietā pastāvošo tiesisko un faktisko situāciju, kā arī tiek analizēti Latvijas iestāžu lēmumos, nacionālo tiesu spriedumos un EST ģenerāladvokāta secinājumos, un EST spriedumā paustie argumenti. Ņemot vērā objektīvās izmeklēšanas principu un iestāžu un tiesu juridiskās obstrukcijas aizlieguma principu, kas nostiprināti Administratīvā procesa likumā, ir izdarīti secinājumi par to, vai pamatlietas izskatīšanas ietvaros minētie principi ir tikuši ievēroti korekti (Administratīvā procesa likums, 2001, 15. panta divpadsmitā daļa, 107. panta ceturtā daļa).

Lai sasniegtu raksta mērķi, tiek izmantota deskriptīvā (aprakstošā), analītiskā un deduktīvā pētniecības metode. Ar deskriptīvās metodes palīdzību tiek atklāts pētāmo normatīvo aktu, tiesību zinātņu literatūras, zinātnisko rakstu, tiesu prakses un citu avotu saturs, ar analītisko metodi tiek analizēts avotu saturs un pamatota turpmāko pētījumu veikšanas nepieciešamība, kā arī ilustrētas normatīvā regulējuma attīstības perspektīvas. Savukārt ar deduktīvo metodi no vispārējām tēzēm izdarīti konkrēti secinājumi, kuri atspoguļoti raksta nobeigumā.

Eiropas Savienības normatīvie akti pamatlietas gadījumā par pacienta tiesībām saņemt pārrobežu veselības aprūpi

Eiropas Savienības Pamattiesību hartā (turpmāk – Pamattiesību harta) ir noteikts, ka

> "ikvienai personai ir tiesības uz profilaktisko veselības aprūpi un ārstniecību saskaņā ar nosacījumiem, kuri paredzēti valstu tiesību aktos un praksē. Nosakot un īstenojot visu ES politiku un darbības, ir jānodrošina augsts cilvēku veselības aizsardzības līmenis" (Eiropas Savienības Pamattiesību harta, 2016, 35. pants).

Attiecībā uz sabiedrības veselību Līgumā par ES darbību (turpmāk – LESD) izvirzīts augsts cilvēku veselības aizsardzības līmenis ES politikā un darbībās (Līgums par Eiropas Savienības darbību, 2016, 168. panta pirmā daļa). Pacienta tiesības saņemt pārrobežu veselības aprūpi ir daļa no četrām ES pamatbrīvībām un īpaši skar brīvu preču un pakalpojumu kustību.

Pacienta pārrobežu veselības aprūpe tiek regulēta ar Eiropas Parlamenta un Padomes 2004. gada 29. aprīļa Regulu Nr. 883/2004/EK (turpmāk – Regula Nr. 883/2004/EK) par sociālās nodrošināšanas sistēmu koordinēšanu un Eiropas Parlamenta un Padomes 2011. gada 9. marta Direktīvu Nr. 2011/24/ES (turpmāk – Direktīva Nr. 2011/24/ES) par pacientu tiesību piemērošanu pārrobežu veselības aprūpē.

Saskaņā ar Regulu Nr. 883/2004/EK "pacientam ir tiesības īpašās situācijās doties uz citu dalībvalsti ar mērķi saņemt veselības aprūpes pakalpojumus" (Medicīnas tiesības, 2015, 117–118). Regulas Nr. 883/2004/EK īstenošanas noteikumi ir ietverti Eiropas Parlamenta un Padomes 2009. gada 16. septembra Regulā (EK) Nr. 987/2009, ar kuru nosaka īstenošanas kārtību Regulai Nr. 883/2004 (turpmāk – Regula Nr. 987/2009). Saskaņā ar Regulu Nr. 883/2004/EK, pastāvot atbilstošiem nosacījumiem, kas izklāstīti turpmāk, katras dalībvalsts kompetentā iestāde (Latvijā tas ir Nacionālais veselības dienests, turpmāk – NVD), izsniedz iepriekšēju atļauju, kas atbilstīgi pamatlietas kontekstam ir S2 veidlapa jeb apliecinājums tiesībām uz plānveida ārstēšanu, veselības aprūpes pakalpojuma saņemšanai citā dalībvalstī, un kompetentā iestāde veic norēķinu par to (Medicīnas tiesības, 2015, 117–118). Saskaņā ar Regulu Nr. 883/2004/EK apdrošinātajai personai, kas ceļo uz citu dalībvalsti, lai saņemtu medicīnisko aprūpi, ir jālūdz kompetentās iestādes iepriekšēja atļauja (Eiropas Parlamenta un Padomes Regula (EK) Nr. 883/2004, 2004, 20. panta 1. punkts).

No Regulas Nr. 883/2004/EK arī izriet, ka

> "apdrošināta persona, kurai kompetentā iestāde ir atļāvusi doties uz citu dalībvalsti ar nolūku saņemt savam stāvoklim atbilstošu ārstēšanu, saņem pabalstus natūrā, kurus kompetentās iestādes uzdevumā nodrošina uzturēšanas vietas iestāde saskaņā ar to tiesību aktu noteikumiem, ko tā piemēro tā, it kā persona būtu apdrošināta saskaņā ar minētajiem tiesību aktiem. Atļauju piešķir, ja attiecīgā ārstēšana ietilpst pabalstos, ko paredz tiesību akti dalībvalstī, kurā dzīvo attiecīgā persona un kurā viņai nevar nodrošināt šādu ārstēšanu termiņā, kas ir medicīniski pamatots, ņemot vērā viņas tā brīža veselības stāvokli un slimības iespējamo gaitu" (Eiropas Parlamenta un Padomes Regula (EK) Nr. 883/2004, 2004, 20. panta 2. punkts).

Līdz ar to, lai saņemtu atļauju doties uz citu dalībvalsti izmantot veselības aprūpes pakalpojumus, jābūt diviem kumulatīviem Regulas Nr. 883/2004/EK 20. panta 2. punktā noteiktajiem kritērijiem:

1) pakalpojumiem ir jābūt nodrošinātiem attiecīgās valsts veselības aprūpes sistēmas ietvaros (attiecībā uz Latviju šim pakalpojumam ir jābūt apmaksājamam no valsts budžeta un pakalpojumu saņēmēju līdzekļiem);

2) šos pakalpojumus nevar nodrošināt termiņā, kas ir medicīniski pamatots, ņemot vērā pacienta tā brīža veselības stāvokli un slimības iespējamo gaitu (Medicīnas tiesības, 2015, 118).

No Direktīvas Nr. 2011/24/ES izriet, ka

"neatkarīgi no pacientu iespējām saņemt pārrobežu veselības aprūpi saskaņā ar šo Direktīvu dalībvalstīm joprojām ir pienākums nodrošināt drošu, augsti kvalitatīvu, efektīvu un kvantitatīvi pietiekamu veselības aprūpi savā teritorijā. Turklāt šīs Direktīvas transponēšana valstu tiesību aktos un tās piemērošana nedrīkstētu radīt tādu stāvokli, ka pacienti tiek mudināti ārstēties ārpus piederības dalībvalsts" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 4. apsvērums).

"Pacientiem, kas vēlas saņemt veselības aprūpi citā dalībvalstī citādos apstākļos nekā tie, kas paredzēti Regulā Nr. 883/2004, vajadzētu būt iespējai izmantot pacientu, pakalpojumu un preču brīvas aprites principus saskaņā ar LESD un ar šo Direktīvu Nr. 2011/24/ES. Vajadzētu garantēt šādas veselības aprūpes izmaksu segšanu pacientiem vismaz tajā apmērā, kāds par identisku veselības aprūpi tiem tiktu nodrošināts piederības dalībvalstī. Šim noteikumam nevajadzētu skart dalībvalstu pienākumu noteikt to pilsoņiem pieejamo slimības pabalstu apmēru un būtiski ietekmēt valsts veselības aprūpes sistēmu finansēšanu" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 29. apsvērums).

"Kritēriji, kas saistīti ar iepriekšēju atļaujas piešķiršanu, būtu jāpamato, ņemot vērā primārus vispārējas intereses iemeslus, ar ko var pamatot veselības aprūpes brīvas aprites šķēršļus, piemēram, plānošanas prasības, lai nodrošinātu pietiekamu un pastāvīgu piekļuvi līdzsvarotai un kvalitatīvai ārstēšanai attiecīgā dalībvalstī vai sasniegtu izmaksu kontroles mērķi un, ciktāl iespējams, novērstu finanšu, tehnisko un personāla resursu nelietderīgu izmantošanu" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 43. apsvērums).

Direktīvā Nr. 2011/24/ES ir noteiktas tiesības atsevišķos gadījumos saņemt atlīdzību par pārrobežu veselības aprūpes pakalpojumiem, par kuriem persona ir norēķinājusies ar saviem personīgajiem līdzekļiem.

Tajā paredzēts, ka,

"neskarot Regulu Nr. 883/2004, piederības dalībvalsts nodrošina apdrošinātajai personai, kas saņēmusi pārrobežu veselības aprūpi, tai radušos izmaksu atlīdzināšanu, ja attiecīgā veselības aprūpe ir pakalpojums, ko apdrošinātajai personai ir tiesības saņemt dalībvalstī" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 7. panta 1. punkts).

"Piederības dalībvalsts vietējā, reģionu vai valsts līmenī nosaka to, par kādu veselības aprūpi apdrošinātajai personai ir tiesības saņemt atlīdzību par izmaksām, un šo izmaksu apjomu neatkarīgi no tā, kur veselības aprūpe tiek sniegta" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 7. panta 3. punkts).

"Piederības dalībvalsts atlīdzina izmaksas par pārrobežu veselības aprūpi vai to tieši apmaksā līdz tādam apmēram, kāds par identisku veselības aprūpi tiktu nodrošināts piederības dalībvalstī, ja šī veselības aprūpe būtu sniegta tās teritorijā, nepārsniedzot saņemtās veselības aprūpes faktiskās izmaksas" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 7. panta 4. punkts).

> "Piederības dalībvalsts var ierobežot izmaksu atlīdzināšanas nosacījumus, kas nostiprināti Direktīvas Nr. 2011/24/ES 9. pantā, attiecībā uz atlīdzību par pārrobežu veselības aprūpi piemērošanu, pamatojoties uz primāriem vispārējas intereses iemesliem, piemēram, plānošanas prasībām, lai nodrošinātu pietiekamu un pastāvīgu piekļuvi līdzsvarotai un kvalitatīvai ārstēšanai attiecīgajā dalībvalstī vai sasniegtu izmaksu kontroles mērķi un lai, ciktāl iespējams, novērstu finanšu, tehnisko un personāla resursu nelietderīgu izmantošanu" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 7. panta 9. punkts).
>
> "Piederības dalībvalsts nenosaka, ka nepieciešama iepriekšēja atļauja, lai varētu saņemt atlīdzību par pārrobežu veselības aprūpes izmaksām, izņemot tad, ja piederības dalībvalsts ir izveidojusi iepriekšēju atļauju sistēmu, lai varētu saņemt atlīdzību par pārrobežu veselības aprūpes izmaksām, un tā attiecas tikai uz to, kas ir vajadzīgs un samērīgs ar sasniedzamo mērķi un nedrīkst būt patvaļīgi diskriminējošs vai nepamatoti traucēt pacientu brīvu pārvietošanos" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 8. panta 1. punkts, 9. pants).
>
> "Veselības aprūpe, uz kuru var attiecināt iepriekšējas atļaujas sistēmu, ir tikai tāda veselības aprūpe, kura jāplāno saskaņā ar prasībām, lai nodrošinātu pietiekamu un pastāvīgu piekļuvi līdzsvarotai un kvalitatīvai ārstēšanai attiecīgā dalībvalstī vai sasniegtu izmaksu kontroles mērķi un, ciktāl iespējams, novērstu finanšu, tehnisko un personāla resursu nelietderīgu izmantošanu, un tai nepieciešama attiecīgā pacienta uzturēšanās aprūpes sniegšanas vietā vismaz vienu nakti vai nepieciešama ārkārtīgi specializēta un dārga medicīnas infrastruktūra vai aprīkojums" (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 8. panta 2. punkta "a" apakšpunkts).

Tomēr kopumā dalībvalsts nedrīkst atteikties piešķirt iepriekšēju atļauju, ja tiktu atzīts, ka pacientam ir atlīdzināmas tam radušās izmaksas atbilstoši Direktīvas Nr. 2011/24/ES 7. pantam, un ja šo veselības aprūpi, pamatojoties uz objektīvu medicīnisku izvērtējumu par pacienta veselības stāvokli, slimības vēsturi un iespējamo slimības attīstību, pacienta sāpju pakāpi un viņa invaliditātes veidu laikā, kad bija iesniegts vai atjaunināts atļaujas pieprasījums, tās teritorijā nevar sniegt medicīniski pamatojamā laikposmā. Dalībvalsts var atteikties piešķirt iepriekšēju atļauju, ja šo veselības aprūpi tās teritorijā var sniegt medicīniski pamatojamā laikposmā, ņemot vērā katra attiecīgā pacienta pašreizējo veselības stāvokli un iespējamo slimības gaitu (Eiropas Parlamenta un Padomes Direktīva Nr. 2011/24/ES, 2011, 8. panta 6. punkta "d" apakšpunkts).

Pacienta tiesības saņemt pārrobežu veselības aprūpi nacionālajos normatīvajos aktos pamatlietas gadījumā

Pamatlietā tika lūgts izsniegt NVD S 2 veidlapu, pamatojoties uz Ministru kabineta 2013. gada 17. decembra noteikumiem Nr. 1529 "Veselības aprūpes organizēšanas un finansēšanas kārtība" (turpmāk – noteikumi Nr. 1529), kas uz šī raksta izstrādes brīdi ir zaudējuši spēku, līdz ar Veselības aprūpes finansēšanas likuma un Ministru kabineta 2018. gada 28. augusta noteikumu Nr. 555 "Veselības aprūpes pakalpojumu organizēšanas

un samaksas kārtība" spēkā stāšanos, kuros ietvertais regulējums pēc būtības ir identisks. Tomēr, tā kā pamatlietā ir strīds par laikposmu, kurā bija spēkā noteikumi Nr. 1529, tie joprojām ir piemērojami izskatāmajā lietā.

Noteikumos Nr. 1529 bija paredzēts, ka NVD izsniedz S2 veidlapu, tādējādi pieņemot personai labvēlīgu lēmumu par iepriekšēju atļauju ārstēšanai stacionārā ES, Eiropas Ekonomikas zonas (turpmāk – EEZ) dalībvalstī vai Šveicē, ja pastāv trīs kumulatīvi nosacījumi:

1) veselības aprūpes pakalpojums saskaņā ar veselības aprūpes jomu regulējošiem normatīvajiem aktiem tiek apmaksāts no valsts budžeta līdzekļiem (Veselības aprūpes organizēšanas un finansēšanas kārtība, 2013, 310.1. punkts);
2) attiecīgo veselības aprūpes pakalpojumu nevar nodrošināt neviena no ārstniecības iestādēm, kas noslēgusi līgumu ar NVD par valsts apmaksātu veselības aprūpes pakalpojumu nodrošināšanu, un par to ir saņemts pamatots ārstniecības iestādes atzinums (Veselības aprūpes organizēšanas un finansēšanas kārtība, 2013, 310.2. punkts);
3) šis pakalpojums personai ir nepieciešams, lai novērstu dzīvības funkciju vai veselības stāvokļa neatgriezenisku pasliktināšanos, ņemot vērā personas veselības stāvokli izvērtēšanas brīdī un paredzamo slimības attīstību (Veselības aprūpes organizēšanas un finansēšanas kārtība, 2013, 310.3. punkts).

Noteikumos Nr. 1529 bija noteikts, ka NVD atsaka izsniegt iepriekšēju atļauju, ja veselības aprūpes pakalpojumu (kardioķirurģisko ārstēšanu stacionārā) var saņemt Latvijā 12 mēnešu laikā (izņemot tad, ja gaidīšana nav pieļaujama personas veselības stāvokļa un paredzamās slimības attīstības dēļ un tas ir norādīts ģimenes ārsta vai speciālista izsniegtā nosūtījumā vai attiecīgās ārstniecības nozares ārstu konsilija atzinumā, kurā norādīts personai nepieciešamais veselības aprūpes pakalpojums, ja plānots saņemt stacionārās veselības aprūpes pakalpojumu) (Veselības aprūpes organizēšanas un finansēšanas kārtība, 2013, 324.2. punkts).

Pamatlietas izskatīšanas gaitā tika konstatēts, ka no personīgajiem līdzekļiem tika segta maksa par veselības aprūpi Polijā un vēlāk tika prasīts atmaksāt šos izdevumus (Veselības aprūpes organizēšanas un finansēšanas kārtība, 2013, 328.2. punkts). Proti, pamatojoties uz to, ka NVD personai, kura Latvijā ir tiesīga saņemt no valsts budžeta līdzekļiem apmaksātus veselības aprūpes pakalpojumus, atmaksā no personīgajiem līdzekļiem segtos izdevumus par citā ES, EEZ dalībvalstī vai Šveicē saņemtajiem veselības aprūpes pakalpojumiem atbilstoši veselības aprūpes pakalpojumu tarifiem, kas noteikti uz veselības aprūpes pakalpojuma saņemšanas brīdi, vai atbilstoši kompensācijas apmēram, kas noteikts normatīvajos aktos par ambulatorajai ārstēšanai paredzēto zāļu un medicīnisko ierīču iegādes izdevumu kompensācijas kārtību, uz brīdi, kad zāles un medicīniskās ierīces iegādātas, ja persona ir saņēmusi plānveida veselības aprūpes pakalpojumus (tai skaitā ar iepriekšēju atļauju), un šos veselības aprūpes pakalpojumus atbilstoši noteikumos Nr. 1529 noteiktajai kārtībai Latvijā apmaksā no valsts budžeta līdzekļiem, izņemot tad,

ja, pamatojoties uz Regulas Nr. 883/2004 un Regulas Nr. 987/2009 noteikumiem, kā arī saskaņā ar tās valsts nosacījumiem par veselības aprūpes pakalpojumu izmaksām, kurā personai tika sniegti veselības aprūpes pakalpojumi, atbilstoši ES, EEZ dalībvalsts vai Šveices kompetentās institūcijas sniegtajai informācijai par personai atmaksājamo summu NVD ir pieņēmis lēmumu par S2 veidlapas izsniegšanu personai, bet samaksu par saņemto veselības aprūpes pakalpojumu persona ir veikusi no personīgajiem līdzekļiem (Veselības aprūpes organizēšanas un finansēšanas kārtība, 2013, 328.2. punkts).

Tiesības uz reliģijas brīvību un atšķirīgas attieksmes aizliegums

Tiesības uz reliģijas brīvību (tiesības uz domas, apziņas un reliģiskās pārliecības brīvību) ir nostiprinātas gan starptautiskajos, gan Eiropas Padomes līmeņa cilvēktiesību instrumentos, kuros noteikts, ka ikvienam ir tiesības uz domas, apziņas un reliģiskās pārliecības brīvību. Šādi cilvēktiesību instrumenti ir, piemēram, Apvienoto Nāciju Organizācijas Vispārējā cilvēktiesību deklarācija, Apvienoto Nāciju Organizācijas Starptautiskais pakts par pilsoņu un politiskajām tiesībām, Eiropas Cilvēktiesību un pamatbrīvību aizsardzības konvencija (turpmāk – ECPAK). Latvijā tiesības uz reliģijas brīvību tiek aizsargātas ar Satversmes 99. pantu (Latvijas Republikas Satversme, 1922).

Tiesības uz reliģijas brīvību kopumā ietver divas koncepcijas: *forum internum* jeb indivīda iekšējo ticību un *forum externum* jeb reliģiskās pārliecības paušanu. Indivīda iekšējo ticību, kas ietver uzskatu pastāvēšanu un tiesības brīvi mainīt un pieņemt savu reliģisko pārliecību vai ticību pēc savas izvēles cilvēktiesību instrumenti aizsargā kā absolūtu – tas nozīmē to, ka tā nevar tikt ierobežota (*Theory and practice of the European Convention on Human Rights*, 2018, 738). Reliģiskās pārliecības paušana ietver ne tikai piedalīšanos reliģiskās ceremonijās un rituālos, bet arī reliģisku simbolu, piemēram, reliģisku rituālu, ceremoniālu priekšmetu izmantošanu, reliģiska apģērba un priekšmetu nēsāšanu ikdienā, svētku un atpūtas dienu un dzīvesveida, kas pamatojams reliģijā, ievērošanu, piemēram, ēšanas paradumu ievērošanu, noteiktas valodas lietošanu, ārstniecības veikšanu. Valsts var iejaukties un ierobežot reliģiskās pārliecības paušanu, ja tai ir negatīva ietekme uz sabiedrību, uz konstitucionālajām vērtībām, kuras ir nepieciešams aizsargāt.

ECT ir definējusi, ka jebkura ierobežojuma noteikšanai demokrātiskā sabiedrībā vispārīgi ir nepieciešams izvērtēt šādus aspektus:

- vai tas ir noteikts ar likumu vai uz likuma pamata;
- vai tam ir leģitīms mērķis;
- vai tas ir samērīgs (*Council of Europe; European Court of Human Rights*, 2020).

Personas reliģiskā pārliecība, it īpaši tad, kad tā tiek pausta, bieži vien ir diskriminācijas iemesls, tādēļ minētie starptautiskie cilvēktiesību instrumenti aizliedz atšķirīgu attieksmi (personas tiešu vai netiešu diskrimināciju, aizskaršanu vai norādījumu to diskriminēt). Atšķirīga attieksme var būt pieļaujama tikai stingri noteiktos gadījumos un ar

nosacījumu, ja tā ir objektīvi pamatota ar tiesisku mērķi, kura sasniegšanai izraudzītie līdzekļi ir samērīgi. Piemēram, šāds nosacījums Latvijā attiecībā uz pacientiem ir ietverts Pacientu tiesību likuma (turpmāk – PTL) 3. panta trešajā daļā. Ar tiesisku mērķi jāsaprot tāds mērķis, kas nav pretrunā ar cilvēktiesībām un konstitucionāla ranga vispārējo tiesību principiem, kurš ir ietverts normatīvajos aktos, turklāt līdzeklim, ar kuru šis mērķis tiek sasniegts, ir jābūt tiesiskam.

Savukārt

> "samērīgums vienlīdzības principa kontekstā nozīmē to, ka labumam, ko sabiedrība iegūst ar atšķirīgo attieksmi pret salīdzināmajām situācijām, ir jābūt lielākam nekā zaudējumam, ko cieš tās personas, kuras atrodas nelabvēlīgākajā no abām situācijām. Ja atšķirīga attieksme noteikta uz likuma pamata, tad, konstatējot, ka tā ir balstīta uz saprātīgiem iemesliem, tiek prezumēts, ka tā ir samērīga" (Šāberte, 2019, 33).

Tiesību uz reliģijas brīvību īstenošana ir viens no ES darbības pamatprincipiem, kas nostiprināts ES Pamattiesību hartā un kas tiek atzīts par valsts demokrātijas, tiesiskuma, miera un stabilitātes pamatu, kas ES dalībvalstīm jāparedz savos tiesību aktos (Prpic, 2018). "Ciktāl ES Pamattiesību hartā ir ietvertas tiesības, kuras atbilst ECPAK garantētajām tiesībām, šo tiesību nozīme un apjoms ir tāds pats kā ECPAK noteiktajām tiesībām. Šis noteikums neliedz Savienības tiesībās paredzēt plašāku aizsardzību" (ES Pamattiesību harta, 2016, 52. panta trešā daļa). "Ciktāl ES Pamattiesību hartā ir atzītas pamattiesības, kuru pamatā ir dalībvalstu kopējas konstitucionālās tradīcijas, šīs tiesības interpretē saskaņā ar minētajām tradīcijām" (ES Pamattiesību harta, 2016, 52. panta ceturtā daļa). ES Pamattiesību hartā noteikts, ka "ES respektē kultūru, reliģiju un valodu daudzveidību" (ES Pamattiesību harta, 2016, 22. pants).

> "Ikvienam ir tiesības uz domu, pārliecības un ticības brīvību. Šīs tiesības ietver brīvību mainīt ticību vai pārliecību un brīvību individuāli vai kolektīvi un publiski vai privāti paust ticību vai pārliecību lūgšanās, mācībās, ieražās un ceremonijās. Uz pārliecību balstītas atteikšanās tiesības atzīst saskaņā ar valstu tiesību aktiem, kas nosaka šo tiesību izmantošanu" (ES Pamattiesību harta, 2016, 10. pants).

Ir aizliegta jebkāda veida diskriminācija, tostarp diskriminācija reliģijas vai pārliecības dēļ (ES Pamattiesību harta, 2016, 21. panta 1. punkts). ES dalībvalstis īsteno ES tiesības ES Pamattiesību hartas 51. panta 1. punkta izpratnē, un tādēļ tām ir jāievēro hartā garantētās pamattiesības, tostarp diskriminācijas aizliegums reliģijas vai pārliecības dēļ (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 34. punkts). ES Pamattiesību hartā nostiprinātais "diskriminācijas aizliegums ir vienlīdzīgas attieksmes principa, kas nostiprināts ES Pamattiesību hartas 20. pantā, īpašā izpausme" (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 35. punkts).

Jebkādas "diskriminācijas aizliegumam reliģijas vai pārliecības dēļ ir imperatīvs raksturs kā ES tiesību vispārējam principam" (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 36. punkts). Ar ES Pamattiesību hartā nostiprināto

diskriminācijas aizliegumu reliģijas vai pārliecības dēļ pašu par sevi pietiek, lai privātpersonām rastos subjektīvas tiesības, uz kurām tās var atsaukties pret tām vērstā tiesvedībā jomā, uz ko attiecas ES tiesības (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 36. punkts). Līdz ar to pārrobežu veselības aprūpes kontekstā dalībvalstij atbilstoši cilvēktiesību aizsardzības pamatprincipiem ir jāpierāda, ka tās atteikums izsniegt iepriekšēju atļauju vai atteikums veikt no personiskajiem līdzekļiem ieguldīto līdzekļu par pārrobežu veselības aprūpes pakalpojumu saņemšanu atmaksu ir objektīvi pamatojams ar tiesisku mērķi, kura sasniegšanai izraudzītie līdzekļi ir samērīgi.

Pamatlietas izklāsts

Ar SIA "Bērnu klīniskā universitātes slimnīca" (turpmāk – slimnīca) ārstu konsilija lēmumu tika atzīts, ka pieteicēja dēlam (turpmāk – pacients) saistībā ar iedzimtu sirds defektu ir nepieciešams veselības aprūpes pakalpojums – *Fallot* tetrādes radikāla korekcija (turpmāk – veselības aprūpes pakalpojums). Slimnīca atzina, ka tā pacientam var nodrošināt veselības aprūpes pakalpojumu, pielietojot asins preparātu transfūziju jeb asins pārliešanu. Pieteicējs pēc savas reliģiskās pārliecības bija Jehovas liecinieks un iebilda, ka veselības aprūpes pakalpojuma laikā varētu tikt veikta asins pārliešana, un vēlējās, lai veselības aprūpes pakalpojums tiktu sniegts bezasiņu perfūzijā jeb mākslīgās asinsrites apstākļos.

Taču ne slimnīcā, ne arī kādā citā Latvijas ārstniecības iestādē veselības aprūpes pakalpojumu nebija iespējams sniegt mākslīgās asinsrites apstākļos, tāpēc pieteicējs vērsās NVD ar lūgumu izsniegt S2 veidlapu. Sākotnēji pieteicējs lūdza S2 veidlapu, lai veselības aprūpes pakalpojumu varētu saņemt Polijas ārstniecības iestādē, kura pakalpojuma sniegšanā nepielieto asins preparātu transfūziju. Jāpievērš uzmanība tam, ka pamatlietas izskatīšanas gaitā pacientam Polijā tika veikta sirds operācija, tādēļ pieteicējs lietas izskatīšanas laikā vēlāk precizēja lūgumu par S2 veidlapas izsniegšanu un lūdza atmaksāt no viņa personīgajiem līdzekļiem segtos izdevumus par pacienta veselības aprūpi atbilstoši Latvijā spēkā esošajiem veselības aprūpes pakalpojumu tarifiem.

Nacionālā veselības dienesta lēmums un nostāja pamatlietā

Ar NVD 2016. gada 29. marta lēmumu Nr. 07.1/7.1-6/3930 (turpmāk – NVD lēmums) pieteicējam tika atteikts izsniegt S2 veidlapu. NVD lēmumā atzīts, ka veselības aprūpes pakalpojums saskaņā ar veselības aprūpes jomu regulējošiem normatīvajiem aktiem tiek apmaksāts no valsts budžeta līdzekļiem, jo nav minēts noteikumu Nr. 1529 1. punktā, kurā noteikti pakalpojumi, ko neapmaksā no valsts budžeta līdzekļiem, un ka pacientam veselības aprūpes pakalpojums ir nepieciešams, pamatojoties uz slimnīcas ārstu konsilija atzinumu, lai novērstu dzīvības funkciju vai veselības stāvokļa neatgriezenisku pasliktināšanos, ņemot vērā personas veselības stāvokli izvērtēšanas brīdī un

paredzamo slimības attīstību. NVD, pamatojoties uz slimnīcas ārstu konsilija atzinumu, pauda nostāju, ka veselības aprūpes pakalpojums var tikt nodrošināts Latvijā, jo slimnīca veselības aprūpes pakalpojumu pacientam varēja nodrošināt, pielietojot asins preparātu transfūziju jeb asins pārliešanu. Līdz ar to NVD atzina, ka netiek izpildīts noteikumu Nr. 1529 310.2. punktā minētais kritērijs, ka attiecīgo veselības aprūpes pakalpojumu neviena no ārstniecības iestādēm, kas noslēgusi līgumu ar NVD par valsts apmaksātu veselības aprūpes pakalpojumu nodrošināšanu, nevar nodrošināt, un par to ir saņemts pamatots ārstniecības iestādes atzinums, kā rezultātā izdeva lēmumu par atteikumu izsniegt S2 veidlapu (Administratīvās rajona tiesas spriedums lietā Nr. A420281216, 2016. gada 9. novembris; Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris; Latvijas Republikas Augstākās tiesas Senāta lēmums lietā Nr. A420281216, 2019. gada 8. marts).

Veselības ministrijas lēmums un nostāja pamatlietā

Nepiekrītot NVD lēmumam, pieteicējs to apstrīdēja VM, kura ar 2016. gada 15. jūlija lēmumu Nr. 01-23.3/3069 (turpmāk – VM lēmums) atstāja spēkā NVD lēmumu, norādot, ka tajā pamatoti ir veikts noteikumu Nr. 1529 izvērtējums. VM, arī sniedzot paskaidrojumus turpmāk tiesvedības procesā, pauda nostāju, ka noteikumu Nr. 1529 310. punkts ir skatāms kopsakarā ar noteikumu Nr. 1529 312.2. punktu, kurā noteikts, ka, lai saņemtu S2 veidlapu, personai NVD jāiesniedz arī attiecīgās ārstniecības nozares ārstu konsilija atzinums, kurā norādīts nepieciešamais pakalpojums, kā arī pamatojums, vai šis pakalpojums personai ir nepieciešams, lai novērstu dzīvības funkciju vai veselības stāvokļa neatgriezenisku pasliktināšanos, ņemot vērā personas veselības stāvokli izvērtēšanas brīdī un paredzamo slimības attīstību, un to, vai pastāv medicīniski pamatoti iemesli, kādēļ personai attiecīgo veselības aprūpes pakalpojumu nepieciešams saņemt citā valstī. Tādējādi, lai saņemtu S2 veidlapu, izšķiroša nozīme ir tam, ka pastāv medicīniski pamatoti iemesli. Ne NVD, ne VM kompetencē nav apšaubīt slimnīcas sniegto informāciju par pakalpojuma nodrošināšanas iespējām un metodi, ko izvēlas slimnīca, nodrošinot no valsts budžeta apmaksājamo veselības aprūpes pakalpojumu.

Nevar piekrist pieteicēja viedoklim, ka pozitīva lēmuma pieņemšanā izšķirīga nozīme ir pieteicēja reliģiskajai pārliecībai, pamatojoties uz ko būtu piešķirama S2 veidlapa. VM piekrīt NVD, ka veselības aprūpes pakalpojumu nodrošinājuma apjoms ir saistīts ar finansējuma apjomu un S2 veidlapas izsniegšanas gadījumā valsts saskaņā ar Polijā noteiktajām izmaksām var iztērēt lielākus finanšu līdzekļus, kas nozīmē, ka papildu iztērētā daļa tiktu atņemta citai Latvijas sabiedrības daļai. Īpašu priekšrocību – valsts apmaksāto veselības aprūpes pakalpojumu – piešķiršana atsevišķai personu grupai (reliģiskās organizācijas biedriem, ko pārstāv pieteicējs) tās reliģiskās pārliecības dēļ rada diskrimināciju citām personu grupām, kas ir sabiedrības noteicošais vairākums. Turklāt noteikumu Nr. 1529 310. punkts ir imperatīva rakstura tiesību norma, kurā nav

paredzēta iestādes rīcības brīvība administratīvā akta izdošanā, proti, pieteicējs vēlas, lai pēc būtības tiktu ņemts vērā kritērijs – reliģiskā pārliecība. Tomēr likumdevējs noteikumu Nr. 1529 310. punktā šādu kritēriju nav noteicis kā izvērtējamu, lemjot jautājumu par S2 veidlapas izsniegšanu. Tādējādi nevar uzskatīt, ka ir tikuši pieļauti diskriminācijas aizlieguma vai tiesību uz reliģijas brīvību pārkāpumi. Tiesības uz reliģijas brīvību var tikt īstenotas ārpus noteikumos Nr. 1529 noteiktās valsts finansētās veselības aprūpes sistēmas (Administratīvās rajona tiesas spriedums lietā Nr. A420281216, 2016. gada 9. novembris; Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris; Latvijas Republikas Augstākās tiesas Senāta lēmums lietā Nr. A420281216, 2019. gada 8. marts).

Pieteicēja nostāja pamatlietā

Nepiekrītot VM lēmumam, pieteicējs to pārsūdzēja tiesā, un tiesvedības procesā, ieskaitot tiesvedību kasācijas instancē, kopumā pauda nostāju, ka gan NVD, gan VM ir veikusi nepareizu noteikumos Nr. 1529 ietverto normu interpretāciju, nonākot pie secinājumiem, kas ir pretrunā ar cilvēka pamattiesībām. Valstī veselības aprūpes sistēmai ir jābūt tādai, kurā tiek ievērota cilvēka cieņa un kurā tiek ņemti vērā tādi aspekti kā cilvēka sociālā labklājība, morālās vērtības, reliģiskie uzskati. Konkrētajā gadījumā iestādes attiecībās ar pieteicēju nav ievērojušas Satversmē un starptautiskajos cilvēktiesību instrumentos garantētās tiesības uz reliģijas brīvību.

Ar atteikumu izsniegt S2 veidlapu pieteicējs, pēc viņa domām, un attiecīgi pacients tika pakļauti diskriminācijai, jo sabiedrības vairākumam ir iespēja saņemt nepieciešamos veselības aprūpes pakalpojumus, neatsakoties no savas reliģiskās vai ētiskās pārliecības, un pacientam šādos apstākļos tikušas liegtas tiesības uz veselības aprūpi, proti, nesaņemot S2 veidlapu, pieteicējs ir ticis diskriminēts reliģiskās pārliecības dēļ, jo personām, kuras nepieder Jehovas liecinieku reliģiskajai pārliecībai, ir tiesības saņemt veselības aprūpes pakalpojumu, neatsakoties no savas reliģiskās pārliecības, un šādā kontekstā ir atzīstams, ka nav nodrošināta vienlīdzīga pieejamība veselības aprūpes pakalpojuma saņemšanai visām personu grupām. Turklāt konkrētajā gadījumā valstī pieejamā veselības aprūpe neatbilst pieņemamības kritērijam, jo ir pretrunā ar pieteicēja reliģisko pārliecību, kas ir viens no tiesību uz veselību pamatprincipiem. Iestādes konkrētajā gadījumā ir radījušas tādus apstākļus, kuros vecāki tiek piespiesti atteikties no savas reliģiskās pārliecības.

Noteikumu Nr. 1529 320.2. punkta kontekstā NVD bija jāatzīst, ka ārstniecības iestādes Latvijā nevar nodrošināt veselības aprūpes pakalpojumu, jo tās to nevar nodrošināt mākslīgās asinsrites apstākļos. Turklāt papildus jāņem vērā, ka pieteicējam nav bijis iespējams ne tikai saņemt S2 veidlapu, bet arī vienoties par veselības aprūpes pakalpojuma saņemšanai Polijā mākslīgās asinsrites apstākļos iztērēto personisko līdzekļu atmaksu noteikumu Nr. 1529 328. punkta noteiktajā kārtībā. Turklāt ir pamats uzskatīt, ka ārstniecības iestāde nespēj nodrošināt nepieciešamā pakalpojuma sniegšanu, tāpēc

NVD bija pienākums izvērtēt ekonomisko izdevīgumu un pieaicināt ārvalstu speciālistu, ja tas izrādītos lētāk par pakalpojuma saņemšanu Polijā, kā tas paredzēts noteikumu Nr. 1529 314. punktā. Pamatlietā nekādas izmaksas nav tikušas aprēķinātas un ekonomiskais izdevīgums nav ticis noteikts (Administratīvās rajona tiesas spriedums lietā Nr. A420281216, 2016. gada 9. novembris; Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris; Latvijas Republikas Augstākās tiesas Senāta lēmums lietā Nr. A420281216, 2019. gada 8. marts).

Administratīvās rajona tiesas spriedums pamatlietā

Ar Administratīvās rajona tiesas (turpmāk – ART) 2017. gada 10. februāra spriedumu lietā Nr. A420281216 (A42-02812-16/16) (turpmāk – ART spriedums) pieteikums tika noraidīts. ART atzina, ka diskriminācijas aizlieguma princips nav pārkāpts un tiesības saņemt veselības aprūpi pacientam nav tikušas liegtas, jo visa nepieciešamā ārstniecība ir pieejama Latvijā un nav identificēta medicīniska prasība veselības aprūpes pakalpojumu saņemt tieši mākslīgās asinsrites apstākļos, proti, ART spriedumā norādīts, ka ir jāpastāv noteikumu Nr. 1529 310. punktā ietverto kritēriju kumulatīvam kopumam, lai NVD būtu pienākums izsniegt pieteicējam S2 veidlapu. No pamatlietas materiāliem tika secināts, ka pacientam veselības aprūpes pakalpojums var tikt sniegts Latvijā. Pamatlietas materiālos nav konstatējami īpaši uz pierādījumiem balstīti kritēriji, kas apstiprinātu, ka slimnīcas izmantotā ārstniecības metode nav piemērojama pacientam. Tieši otrādi, slimnīcas konsilija lēmumā arī norādīts, ka veselības aprūpes pakalpojuma sniegšanai vēlīnā vecumā mākslīgās asinsrites apstākļos nav tieša medicīniska pamatojuma. Lēmums atteikt izsniegt S2 veidlapu nav saistīts ar pieteicēja reliģisko pārliecību, bet gan ar to, ka veselības aprūpes pakalpojumu ir iespējams nodrošināt Latvijā (Administratīvās rajona tiesas spriedums lietā Nr. A420281216, 2016. gada 9. novembris, 5.–9. punkts).

> "Saskaņā ar PTL 4. panta sesto daļu katrai personai Ārstniecības likumā noteiktajā kārtībā ir tiesības saņemt veselības stāvoklim atbilstošus aprūpes pakalpojumus. Savukārt par pacienta veselības stāvoklim atbilstošu veselības aprūpes pakalpojumu saņemšanu pacienta ārstniecībai lemj ārstniecībā iesaistītās ārstniecības personas. Kad ārstniecības persona pieņēmusi lēmumu par iespējamo ārstniecību, tā piedāvājama pacientam, ievērojot pacienta tiesības izdarīt izvēli un sniegt informētu piekrišanu ārstniecībai vai atteikties no tās. PTL 5. panta sestā daļa noteic, ja ārstniecības iespējas ir ierobežotas vai pieļaujama vairāku veidu ārstniecība, pacientam ir tiesības uz ārsta profesionāli izdarītu izvēli, kuras pamatā ir uz pierādījumiem balstīti medicīniskie kritēriji" (Administratīvās rajona tiesas spriedums lietā Nr. A420281216, 2016. gada 9. novembris, 11. punkts).

Atbilstoši Ārstniecības likuma 36. pantam ārstniecības persona ir atbildīga par izraudzītās medicīniskās tehnoloģijas lietošanu un tās radītajām sekām. PTL 5. panta sestajā daļā paredzēts, ja ārstniecības iespējas ir ierobežotas vai pieļaujama vairāku veidu ārstniecība, pacientam ir tiesības uz ārsta profesionāli izdarītu izvēli, kuras pamatā ir

uz pierādījumiem balstīti medicīniskie kritēriji. Konkrētajā gadījumā šādā kontekstā, pamatojoties uz slimnīcas ārstu konsilija atzinumu, tika piedāvāts pacientam sniegt veselības aprūpes pakalpojumu. PTL 6. pantā ir reglamentēta kārtība, kādā var atteikties no ārstniecības. Reliģiskā pārliecība ir privāta rakstura iemesls, lai atteiktos no ārstniecības, un ārstniecības personām tas ir jārespektē. Apstāklis, ka pieteicējs nepiekrīt slimnīcas piedāvātajai ārstniecības metodei un ir izmantojis savas tiesības atteikties no tās, nav pietiekams, lai konstatētu, ka ārstniecības iestāde nevar nodrošināt pacientam veselības aprūpes pakalpojumu vispār.

Ja pacients nepiekrīt ārstniecības metodei, kas tiek apmaksāta no valsts budžeta, tad pacientam ir tiesības par saviem līdzekļiem vienoties ar ārstniecības iestādi, kuras ārstniecībai viņš piekrīt un kuras sniegtie veselības aprūpes pakalpojumi viņam ir pieņemami. Tomēr tas nenozīmē valsts pienākumu apmaksāt šos pakalpojumus no valsts budžeta līdzekļiem. NVD nav ierobežojis pieteicēja tiesības izdarīt izvēli attiecībā uz veselības aprūpes pakalpojuma saņemšanu un nav šīs tiesības apšaubījis. Līdz ar to nav pamatots pieteicēja arguments, ka noteikumu Nr. 1529 320.2. punkta kontekstā NVD bija jāatzīst, ka ārstniecības iestādes Latvijā nevar nodrošināt veselības aprūpes pakalpojumu, jo tās to nevar nodrošināt mākslīgās asinsrites apstākļos (Administratīvās rajona tiesas spriedums lietā Nr. A420281216, 2016. gada 9. novembris, 11.–12. punkts).

Attiecībā uz pieteicēja lūgumu atmaksāt izdevumus ART norādīja, ka pieteicējs sākotnēji nav lūdzis izdevumu atmaksu, "kā to paredz noteikumu Nr. 1529 323. punkts", līdz ar to jautājums nevar tikt izvērtēts. Turklāt, lai personai tiktu veikta izdevumu atlīdzināšana, pamatojoties uz veselības aprūpes tarifiem, kas ir spēkā Latvijā, nepieciešama NVD izsniegta iepriekšējā atļauja, proti, S2 veidlapa (Administratīvās rajona tiesas spriedums lietā Nr. A420281216, 2016. gada 9. novembris, 12. punkts).

Tāpat ART norādīja, ka ārvalstu speciālista piesaiste, kā tas paredzēts noteikumu Nr. 1529 314. punktā, nav iespējama, jo ārvalstu speciālists būtu jāpieaicina gadījumā, ja veselības aprūpes pakalpojumu būtu iespējams sniegt Latvijā, pieaicinot citas valsts ārstniecības personu ārstniecības iestādē. Šis jautājums pamatlietā nav aktuāls, jo slimnīcas rīcībā nav atbilstoša mākslīgās asinsrites aprīkojuma, ar ko sniegt veselības aprūpes pakalpojumu (Administratīvās rajona tiesas spriedums lietā Nr. A420281216, 2016. gada 9. novembris, 13. punkts).

Administratīvās apgabaltiesas spriedums pamatlietā

Ar Administratīvās apgabaltiesas (turpmāk – AAT) 2017. gada 10. februāra spriedumu lietā Nr. A420281216 (AA43-0920-17/13) tika atstāts negrozīts ART spriedums, norādot, ka ART ir pareizi konstatējusi lietas faktiskos un tiesiskos apstākļus, kā arī ir izdarījusi pareizus un ar tiesību normām pamatotus secinājumus, papildus norādot, ka pacientam nepieciešamais pakalpojums ir no valsts budžeta līdzekļiem apmaksājams veselības aprūpes pakalpojums, un nav strīda, ka tas ir nepieciešams, lai novērstu dzīvības

funkciju vai veselības stāvokļa neatgriezenisku pasliktināšanos. Tomēr, lai tiktu izsniegta S2 veidlapa, ir jāizpildās visiem noteikumu Nr. 1529 310. punktā minētajiem kritērijiem. Konkrētajā gadījumā neizpildās noteikumos Nr. 1529 310.2. punktā noteiktais kritērijs.

Pret pieteicēju nav pieļauta diskriminācija reliģiskās pārliecības dēļ, jo valsts pacientam nepieciešamo ārstniecību var nodrošināt. Valstij nav pienākums nodrošināt ikvienai personai ārstēšanu par valsts līdzekļiem tieši ar personas izvēlēto metodi. Ja persona nepiekrīt ārstniecības metodei, ko apmaksā valsts, tad šai personai ir tiesības no saviem līdzekļiem apmaksāt ārstēšanu ar citu metodi. Lēmums atteikt apmaksāt no valsts budžeta līdzekļiem ārvalstī sniegtu pakalpojumu nav saistīts ar pieteicēja reliģisko pārliecību, bet gan ar to, ka nepieciešamo ārstēšanu var nodrošināt Latvijā. Pacientam, protams, ir tiesības atteikties no viņam nepieņemamas ārstēšanas, taču valsts ir izpildījusi savu pienākumu nodrošināt, lai veselības aprūpes pakalpojumi būtu pacientam ētiski un kulturāli pieņemami. Apstāklis, ka slimnīcā veselības aprūpes pakalpojums netiek sniegts atbilstoši pieteicēja izvēlētajai metodei, nenozīmē, ka slimnīca šo pakalpojumu kā tādu nevar nodrošināt. Lēmumu par atteikumu izsniegt S2 veidlapu konkrētajā gadījumā nekādi neietekmē pieteicēja reliģiskie uzskati, bet gan tas, ar kādām metodēm Latvijā var sniegt veselības aprūpes pakalpojumu. Ārstniecības personām nav pienākuma izmantotās metodes ārstniecībā pielāgot katras konkrētās personas reliģiskajiem uzskatiem, bet gan nodrošināt attiecīgā pakalpojuma sniegšanu vispār, savas metodes balstot uz medicīniski pamatotiem kritērijiem (Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris, 12. punkts).

Līdz ar to, ka

> "veselības aprūpes pakalpojuma sniegšana mākslīgās asinsrites apstākļos vēl nav kļuvusi par visā pasaulē vispārpieņemamu medicīniski pamatotu ārstniecības metodi un par tās ieguvumiem joprojām tiek diskutēts, nav iespējams pieprasīt, lai visas ārstniecības personas to izvēlētos īstenot, jo atbilstoši Ārstniecības likuma 36. pantam par izraudzītās medicīniskās tehnoloģijas lietošanu un tās sekām ir atbildīga ārstniecības persona" (Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris, 13. punkts).

AAT par pamatotiem atzinusi ART spriedumā izdarītos secinājumus, kas attiecas uz PTL 4. panta sesto daļu, PTL 5. panta sesto daļu un secinājumu, ka ārstniecības persona, pieņemot lēmumu par ārstniecības metodi atbilstoši Ārstniecības likuma 36. pantam, ir atbildīga par izraudzītās medicīniskās tehnoloģijas lietošanu un tās radītajām sekām. Tāpat AAT pievienojās ART nostājai, ka konkrētajā gadījumā pieteicējam tika piedāvāts sniegt pakalpojumu, kas saistīts ar asins preparātu transfūziju un ka slimnīca informēja pieteicēju, ka tā nevar realizēt operācijas mākslīgā asisnsritē bezasiņu perfūzijā, pielietojot asins preparātu transfūziju. Līdz ar to AAT pievienojās ART nostājai, ka pamatlietā nav iegūts medicīniski pamatots apstiprinājums tam, ka pacientam veselības aprūpes pakalpojumu nevar veikt, izmantojot asins preparātu transfūziju (Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris, 13. punkts).

Vienlaikus AAT pievienojās ART norādītajam:

> "[..] noteikumu Nr. 1529 16. nodaļa noteic kārtību, kādā tiek atlīdzināti izdevumi par citā ES, EEZ dalībvalstī un Šveicē saņemtajiem veselības aprūpes pakalpojumiem. Konkrētajā gadījumā pieteicēja dēlam nepieciešama sirdskaites ķirurģiska korekcija un "atbilstoši noteikumu Nr. 1529 323. punktam", lai personai tiktu veikta izdevumu atlīdzināšana, pamatojoties uz veselības aprūpes tarifiem, kas ir spēkā Latvijā, nepieciešama dienesta izsniegta iepriekšējā atļauja. Pieteicējs nav pieprasījis dienestam izsniegt iepriekšējo atļauju, līdz ar to jautājums par pieteicēja tiesībām pretendēt uz izdevumu atmaksu pēc pakalpojuma saņemšanas iestādē nav izskatīts. Tādējādi nav pamatots pieteikumā norādītais, ka pieteicējam nav iespējams saņemt kompensāciju par veselības aprūpes pakalpojuma saņemšanu Polijas ārstniecības iestādē, jo pieteicējs noteikumu Nr. 1529 noteiktajā kārtībā nav vērsies iestādē ar šādu lūgumu" (Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris, 6.8. punkts).

Papildus minētajam AAT norādīja, ka pieteicējam jāņem vērā, ka reliģijas brīvība nav absolūta un tā ir ierobežojama, it īpaši gadījumos, ja skartas tiek citas personas pamattiesības. Apstāklis, ka vecākiem ir tiesības audzināt bērnus saskaņā ar savu reliģisko pārliecību un filosofiskajiem uzskatiem un ka vecāki ir galvenie lēmuma pieņēmēji attiecībā uz saviem bērniem, nenozīmē, ka vecāku vara ir absolūta un neierobežota. Vecāku brīvību izlemt bērnam svarīgus jautājumus izņēmuma gadījumos var ierobežot, lai aizsargātu bērna intereses. Atbilstoši Apvienoto Nāciju Organizācijas Bērnu tiesību konvencijas 3. pantam, Bērnu tiesību aizsardzības likuma 6. panta pirmajai daļai, kā arī Bērnu tiesību aizsardzības likuma 24. panta piektajai daļai vecāku galvenais uzdevums ir nodrošināt, lai tiktu īstenotas bērna labākās intereses un netiktu nodarīts kaitējums. It īpaši tas attiecas uz situāciju, kurā var tikt apdraudēta bērna dzīvība, kā tas ir šajā gadījumā. Arī ārstam saskaņā ar Konvencijas par cilvēktiesību un cieņas aizsardzību bioloģijā un medicīnā – Konvencijas par cilvēktiesībām un biomedicīnu skaidrojuma 48. punktu un PTL 14. panta pirmo daļu ir pienākums aizsargāt nepilngadīgu pacientu pret tādiem likumisko pārstāvju lēmumiem, kuri nav šī pacienta interesēs, kas ir gadījumos, ja nepilngadīga pacienta likumiskais pārstāvis atsakās dot savu piekrišanu ārstniecībai. Pacients konkrētajā gadījumā tiek pakļauts riskam, kas nav medicīniski pamatots un nepieciešams. Pacienta interesēs ir pēc iespējas ātrāk saņemt nepieciešamos veselības aprūpes pakalpojumus. Tā kā attiecīgo pakalpojumu slimnīcā var nodrošināt, tad vecākiem, ievērojot bērnu interešu prioritātes principu, būtu jāpiekāpjas saviem reliģiskajiem apsvērumiem, lai neapdraudētu bērna dzīvību (Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris, 14. punkts).

Augstākās tiesas Senāta lēmums pamatlietā un prejudiciālie jautājumi

Atbilstoši "Administratīvā procesa likuma 103. pantam administratīvā procesa tiesā būtība ir tiesas kontrole pār iestādes izdota administratīvā akta tiesiskumu" (Briede, 2020). Lai veiktu korektu kontroli par iestāžu izdoto administratīvo aktu tiesiskumu,

vienotu ES tiesību piemērošanu, dalībvalstu tiesām neskaidrību gadījumā par tiesību normas interpretāciju, ir dotas iespējas gūt skaidrību, vēršoties ar prejudiciālo jautājumu EST (Briede, 2020).

Izskatot kasācijas sūdzību, Augstākās tiesas Senātam radās šaubas par to, vai pamatlietā tikušas pareizi piemērotas un interpretētas tiesību normas, tostarp ES tiesību normas attiecībā uz lietas faktiskajiem apstākļiem. Augstākās tiesas Senātam radās šaubas par to, vai konkrētajā gadījumā bija pieļaujams atteikties izsniegt S2 veidlapu, pamatojoties tikai uz medicīniska rakstura kritērijiem, vai arī šajā saistībā bija jāņem vērā arī reliģiskā pārliecība. Tādēļ ar Augstākās tiesas Senāta 2019. gada 8. marta lēmumu lietā Nr. A420281216 (SKA-143/2019) tika nolemts apturēt tiesvedību pamatlietā, uzdodot EST divus prejudiciālos jautājumus:

1) vai Regulas Nr. 2004/883/EK 20. panta 2. punkts kopsakarā ar Pamattiesību hartas 21. panta 1. punktu ir interpretējams tādējādi, ka dalībvalsts drīkst atteikt Regulas Nr. 2004/883/EK 20. panta 1. punktā minēto atļauju, ja personas dzīvesvietas valstī ir pieejama stacionārā ārstēšana, par kuras medicīnisko efektivitāti nav šaubu, taču izmantotā ārstēšanas metode neatbilst personas reliģiskajai pārliecībai;
2) vai LESD 56. pants un Direktīvas Nr. 2011/24/ES par pacientu tiesību piemērošanu pārrobežu veselības aprūpē 8. panta 5. punkts kopsakarā ar Pamattiesību hartas 21. panta 1. punktu ir interpretējams tādējādi, ka dalībvalsts drīkst atteikt Direktīvas Nr. 2011/24/ES 8. panta 1. punktā minēto atļauju, ja personas piederības valstī ir pieejama stacionārā ārstēšana, par kuras medicīnisko efektivitāti nav šaubu, taču izmantotā ārstēšanas metode neatbilst personas reliģiskajai pārliecībai (Latvijas Republikas Augstākās tiesas Senāta lēmums lietā Nr. A420281216, 2019. gada 8. marts, 22. punkts)?

Eiropas Savienības Tiesas ģenerāladvokāta secinājumi pamatlietā

EST ģenerāladvokāts 2020. gada 30. aprīlī, sniedzot secinājumus pamatlietā, pauda nostāju, ka uz Augstākās tiesas Senāta pirmo jautājumu būtu jāatbild, ka Regulas Nr. 883/2004/EK 20. panta 2. punkts kopsakarā ar Pamattiesību hartas 10. panta 1. punktu un 21. panta 1. punktu ir jāinterpretē tādējādi, ka dalībvalsts drīkst atteikt Regulas Nr. 2004/883/EK 20. panta 1. punktā minēto atļauju, ja personas piederības dalībvalstī ir pieejama stacionārā ārstēšana, par kuras medicīnisko efektivitāti nav šaubu, pat ja izmantotā ārstēšanas metode neatbilst personas reliģiskajai pārliecībai, ja atteikums ir objektīvi pamatots ar likumīgu mērķi un ja šā mērķa sasniegšanas līdzekļi ir piemēroti un vajadzīgi. Ja nav organizatorisku vai strukturālu prasību, kas būtu saistītas ar atbilstoši paredzētajai kārtībai veiktu un līdzsvarotu efektīvas veselības aprūpes sniegšanu piederības dalībvalstī, šī dalībvalsts atbilstoši Regulas Nr. 883/2004 20. panta 2. punktā paredzētajam otrajam nosacījumam var atteikties ņemt vērā reliģisko pārliecību, ja tas

varētu radīt novērtējamu izmaksu palielinājumu piederības dalībvalstij par sliktu efektīvai veselības aprūpes sniegšanai citiem cilvēkiem. (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 99.1. punkts).

Attiecībā uz Augstākās tiesas Senāta otro jautājumu būtu jāatbild, ka tad, ja nav organizatorisku vai strukturālu prasību attiecībā uz atbilstoši paredzētajai kārtībai veiktu un līdzsvarotu efektīvas veselības aprūpes sniegšanu piederības dalībvalstī, LESD 56. pants un Direktīvas Nr. 2011/24/ES 8. panta 2. punkts, 5. punkts un 6. punkta "d" apakšpunkts kopsakarā ar Pamattiesību hartas 10. panta 1. punktu un 21. panta 1. punktu ir jāinterpretē tādējādi, ka piederības dalībvalsts nedrīkst atteikt Direktīvas Nr. 2011/24/ES 8. panta 1. punktā minēto atļauju, ja personas piederības valstī ir pieejama stacionārā ārstēšana, par kuras medicīnisko efektivitāti nav šaubu, taču izmantotā ārstēšanas metode neatbilst personas patiesajai reliģiskajai pārliecībai, ja vien tā rezultātā, pamatojoties uz reliģisko pārliecību, nepalielinātos pieteikumu skaits pārrobežu veselības aprūpes saņemšanai, kas varētu apdraudēt (un to ir iespējams novērtēt) atbilstoši paredzētajai kārtībai veiktu un līdzsvarotu efektīvas veselības aprūpes sniegšanu šajā dalībvalstī. EST ģenerāladvokāts vērsa uzmanību, ka abos jautājumos fakti ir jāpārbauda iesniedzējtiesai (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 99.1., 99.2. punkts).

Regulas Nr. 883/2004 20. panta 2. punktā noteiktais "ir saistīts vienīgi ar medicīnisku vajadzību, nevis ar attiecīgā pacienta personisko izvēli (reliģiski vai citi apsvērumi), līdz ar to Latvijas iestāžu lēmums atteikties izsniegt S2 veidlapu principā nevarētu tikt atzīts par neatbilstošu, atsaucoties uz šo konkrēto nosacījumu" (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 54., 55. punkts). Vienlaikus EST ģenerāladvokāts norādīja, ka Direktīvas Nr. 2011/24 8. panta 1. punktā paredzēts, ka piederības dalībvalsts var izveidot iepriekšēju atļauju sistēmu, lai pacienti varētu saņemt atlīdzību par noteiktām pārrobežu veselības aprūpes izmaksām, it īpaši tad, ja nepieciešama attiecīgā pacienta uzturēšanās aprūpes sniegšanas vietā un ja nepieciešams ārkārtīgi specializēts aprīkojums. Tomēr noteiktajiem ierobežojumiem atbilstoši Direktīvas Nr. 2011/24 8. panta 1. punktam ir jābūt tādiem, kas ir vajadzīgi un ir samērīgi ar sasniedzamo mērķi.

> "Jebkādi šādi ierobežojumi nedrīkst būt patvaļīgi diskriminējoši vai nepamatoti traucēt pacientu brīvu pārvietošanos. Tādējādi iespēja ierobežot pieeju pārrobežu veselības aprūpei būtībā ir izņēmums un attiecīgi ir jāinterpretē šauri" (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 65. punkts).

Tomēr kopumā Direktīvas Nr. 2011/24 8. panta 5. punktā arī ir paredzēts, ka

> "piederības dalībvalsts nedrīkst atteikt iepriekšēju atļauju, ja pacientam ir tiesības uz attiecīgo veselības aprūpes pakalpojumu atbilstoši 7. pantam un ja šo aprūpi nevar sniegt tās teritorijā medicīniski pieņemamā laikā" (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 67. punkts).

Konkrētajā lietā, ievērojot to, ka lietā pastāv apsvērumi, kas skar reliģiskās pārliecības *forum externum*, proti, reliģiskas pārliecības publisku paušanu, iesniedzējtiesai ir jāizvērtē, vai šīs valsts tiesību normas netieši traucē praktizēt reliģiju vai ievieš atšķirīgu

attieksmi, kas netieši ir balstīta uz reliģisko pārliecību vai ticību. Saskaņā ar EST praksi, piemēram, EST spriedumu lietā *G4S Secure Solutions* (Eiropas Savienības Tiesas spriedums lietā Nr. C-157/15, 2017. gada 14. marts), attiecīgās normas nepamatoti netraucē reliģijas praktizēšanu un nerada netiešu diskrimināciju, ja tās ir objektīvi pamatotas ar leģitīmu mērķi un ja šā mērķa sasniegšanai izmantotie līdzekļi ir samērīgi un vajadzīgi. (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 75. punkts).

Pirmšķietami Latvijas tiesību normas, kuras ir balstītas arī uz Regulas Nr. 883/2004 20. panta 2. punktu un Direktīvas Nr. 2011/24 8. panta 6. punkta "d" apakšpunktu un kuras attiecas uz prasību par neatliekamas medicīniskas vajadzības esamību, lai pacienta ārstēšanas izmaksas Polijā tiktu atmaksātas, ir neitrālas, neaizliedz tieši praktizēt reliģiju un nerada tiešu diskrimināciju reliģiskās pārliecības dēļ. Vienlaikus EST ģenerāladvokāts norādīja, ka Latvijas tiesai ir jāpārbauda, vai konkrētajā situācijā netiek radīta netieša diskriminācija (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 74. punkts).

EST ģenerāladvokāts uzsvēra, ka pamatlietā izmaksas ir būtisks faktors:

> "Lai arī reliģijas brīvība ir būtiska brīvā sabiedrībā, kurā dalībvalstij būtu pēc iespējas jāpieņem un jāaizsargā reliģiskās pārliecības un filozofisko uzskatu atšķirības, finansiāla atbalsta piešķiršana no valsts budžeta līdzekļiem ir pilnīgi cits jautājums. Visplašākās reliģiskās brīvības garantijas – tādas kā Pamattiesību hartas 10. panta 1. punktā, ECPAK 9. pantā un arī dalībvalstu konstitūcijās paredzētās – pašas par sevi neliek valstīm izveidot finansiālā atbalsta sistēmu, lai indivīdi varētu praktizēt savu reliģisko pārliecību, piemēram, nevar apgalvot, ka dalībvalstij būtu pienākums nodrošināt transportu, lai gados vecs un nabadzīgs konkrētās ticības pārstāvis varētu apmeklēt dievkalpojumus baznīcā, pat ja, iespējams, varētu pierādīt, ka citādi viņš nevarētu izpildīt savus reliģiskos pienākumus" (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 82. punkts).

Ja dalībvalstij

> "nav organizatorisku vai strukturālu iemeslu, ar kuriem varētu attaisnot LESD 56. pantā garantētās pakalpojumu sniegšanas brīvības veselības aprūpes jomā ierobežojumu, ir maz ticams, ka ar līdzīgiem kritērijiem varētu tikt attaisnots ierobežojums tiesībām praktizēt savu reliģiju vai neciest no diskriminācijas reliģiskās pārliecības dēļ atbilstoši Pamattiesību hartā garantētajam, izņemot tad, ja šādi varētu palielināties pieteikumu skaits pārrobežu veselības aprūpes saņemšanai reliģiskās pārliecības dēļ un ja šādi varētu tikt apdraudēta atbilstoši paredzētajai kārtībai veikta un līdzsvarota veselības aprūpes sniegšana Latvijā, ko ir iespējams novērtēt" (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 80. punkts).
>
> "Šajā ziņā ir jānorāda, ka VM un Latvijas valdība rakstveida apsvērumos galvenokārt atsaucās uz Latvijā veselības aprūpei pieejamiem ierobežotiem resursiem kā uz attaisnojumu atteikumam izsniegt iepriekšēju atļauju. Organizatoriskie vai strukturālie iemesli paši par sevi netika minēti kā attaisnojums atteikumam atļaut pārrobežu veselības aprūpi, nepastāvot neatliekamai medicīniskai vajadzībai" (Ģenerāladvokāta Džerarda Hogana secinājumi lietā Nr. C-243/19, 2020. gada 30. aprīlis, 81. punkts).

EST spriedums pamatlietā

EST, pamatlietā Nr. C-243/19 atbildot uz pirmo Augstākās tiesas Senāta jautājumu, nosprieda, ka Regulas Nr. 883/2004 20. panta 2. punkts, lasot to kopsakarā ar Pamattiesību hartas 21. panta 1. punktu, ir jāinterpretē tādējādi, ka dalībvalsts drīkst atteikt šīs Regulas 20. panta 1. punktā minēto atļauju, ja šajā dalībvalstī ir pieejama stacionārā ārstēšana, par kuras medicīnisko efektivitāti nav šaubu, taču izmantotā ārstēšanas metode neatbilst personas reliģiskajai pārliecībai (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 86.1. punkts).

Savukārt, atbildot uz otro Augstākās tiesas Senāta jautājumu, Direktīvas Nr. 2011/24/ES 8. panta 5. punkts un 6. punkta "d" apakšpunkts, lasot tos kopsakarā ar Pamattiesību hartas 21. panta 1. punktu, – ir jāinterpretē tādējādi, ka pacienta piederības dalībvalsts nedrīkst atteikt viņam šīs Direktīvas 8. panta 1. punktā paredzēto atļauju, ja šajā dalībvalstī ir pieejama stacionārā ārstēšana, par kuras medicīnisko efektivitāti nav šaubu, taču izmantotā ārstēšanas metode neatbilst šā pacienta reliģiskajai pārliecībai, ja vien šāds atteikums nav objektīvi pamatots ar leģitīmu mērķi saglabāt veselības aprūpes jaudu vai medicīnisko kompetenci un ja vien tas nav piemērots un vajadzīgs pasākums šā mērķa sasniegšanai, un tas ir jāpārbauda iesniedzējtiesai (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 86.2. punkts).

Par pirmo jautājumu EST norādīja, ka

> "saskaņā ar Regulas Nr. 883/2004 20. panta 1. punktu apdrošinātajai personai, kas ceļo uz citu dalībvalsti, lai saņemtu medicīnisko aprūpi, principā ir jālūdz kompetentās iestādes iepriekšēja atļauja" (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 23. punkts).

Regulas Nr. 883/2004 20. panta 2. punkta pirmā kritērija mērķis ir dot tiesības uz pabalstiem natūrā, ko par kompetentās iestādes līdzekļiem sniedz uzturēšanās vietas iestāde atbilstoši tās dalībvalsts tiesību aktiem, kurā pabalsti tiek sniegti, tā, it kā ieinteresētā persona būtu šīs pēdējās iestādes pārziņā. Tādējādi sociāli apdrošinātām personām tiek piešķirtas tiesības, kādu tām citādi nebūtu, jo, tā kā šīs tiesības ir saistītas ar izdevumu segšanu, ko uzņemas uzturēšanās vietas iestāde saskaņā ar tiesību aktiem, ko tā piemēro, šīs tiesības minētajām apdrošinātajām personām nevarētu tikt garantētas tikai saskaņā ar kompetentās dalībvalsts tiesību aktiem (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 23., 24. punkts).

> "Pamatlietā aplūkotais pakalpojums ir paredzēts Latvijas tiesību aktos. Līdz ar to pirmais kritērijs, kas ir ietverts Regulas Nr. 883/2004 20. panta 2. punktā (pakalpojumiem ir jābūt nodrošinātiem attiecīgās valsts veselības aprūpes sistēmas ietvaros, un Latvijas gadījumā pakalpojumam ir jābūt apmaksātam no valsts budžeta un pakalpojumu saņēmēju līdzekļiem), pamatlietā ir izpildīts" (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 26. punkts).

EST atzina, ka strīdīgais jautājums pamatlietā ir par to, vai ir izpildīts šajā tiesību normā paredzētais otrais kritērijs (pakalpojumu nevar nodrošināt termiņā, kas ir medicīniski pamatots, ņemot vērā pacienta tābrīža veselības stāvokli un slimības iespējamo gaitu). EST, atsaucoties uz EST praksi, piemēram, EST spriedumu lietā *Elena Petru v. Casa Județeană de Asigurări de Sănătate Sibiu, Casa Națională de Asigurări de Sănătate* (Eiropas Savienības Tiesas spriedums lietā Nr. C-268/13, 2014. gada 9. oktobris), norādīja, ka vajadzīgās atļaujas izsniegšanu nevar atteikt tad, ja identisku vai tikpat efektīvu ārstēšanu nevar laikus veikt ieinteresētās personas dzīvesvietas dalībvalstī. No EST judikatūras, piemēram, EST sprieduma lietā The *Queen*, pēc *Yvonne Watts* lūguma pret *Bedford Primary Care Trust* un *Secretary of State for Health* (Eiropas Savienības Tiesas spriedums lietā Nr. C-372/04, 2006. gada 16. maijs); EST sprieduma lietā *Georgi Ivanov Elchinov v. Natsionalna zdravnoosiguritelna kasa* (Eiropas Savienības Tiesas spriedums lietā Nr. C-173/09, 2010. gada 5. oktobris); Eiropas Savienības Tiesas spriedums lietā *Elena Petru v. Casa Județeană de Asigurări de Sănătate Sibiu, Casa Națională de Asigurări de Sănătate* (Eiropas Savienības Tiesas spriedums lietā Nr. C-268/13, 2014. gada 9. oktobris), izriet, ka visu to apstākļu, kas raksturo katru konkrēto gadījumu un kas ir jāņem vērā, pārbaude, lai noteiktu, vai identisku vai tikpat efektīvu ārstēšanu var saņemt apdrošinātās personas dzīvesvietas dalībvalstī, ir objektīvs medicīnisks novērtējums: rūpīgi ņemot vērā ne tikai pacienta veselības stāvokli atļaujas pieprasīšanas brīdī un – vajadzības gadījumā – sāpju pakāpi vai viņa invaliditātes veidu, bet arī pacienta slimības vēsturi (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 32., 33. punkts).

> "Ja dalībvalsts atsakās piešķirt Regulas Nr. 883/2004 20. panta 1. punktā paredzēto iepriekšējo atļauju, tai ir jāievēro Pamattiesību hartā garantētās, tostarp tās 21. pantā paredzētās, pamattiesības, kā arī vienlīdzīgas attieksmes princips" (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 34. punkts).

EST konstatēja, ka Latvijas tiesiskais regulējums ir formulēts neitrāli un nerada tiešu diskrimināciju reliģijas dēļ. Vienlaikus tika secināts, ka atteikums piešķirt pieteicējam Regulas Nr. 883/2004 20. panta 1. punktā paredzēto iepriekšējo atļauju rada netiešu atšķirīgu attieksmi reliģijas dēļ, jo pacientiem, kuriem tiek veikta medicīniska manipulācija ar asins pārliešanu, tās izmaksas tiek segtas no dzīvesvietas dalībvalsts sociālā nodrošinājuma sistēmas, bet pacientiem, kuri reliģisku iemeslu dēļ nolemj neveikt šādu operāciju šajā dalībvalstī un citā dalībvalstī izmantot ārstēšanu, kura nav pretrunā viņu reliģiskajai pārliecībai, izmaksas netiek segtas. Taču atšķirīga attieksme var tikt atzīta par pamatotu, ja tā ir balstīta uz objektīvu un saprātīgu kritēriju, proti, ja tā atbilst leģitīmi pieņemamam mērķim, kas ir izvirzīts attiecīgajā tiesiskajā regulējumā, un ja šī atšķirība ir samērīga ar mērķi, ko ar attiecīgo attieksmi tiecas sasniegt, tas nozīmē, ka salīdzināmās situācijās nedrīkst būt atšķirīga attieksme un ka atšķirīgās situācijās nedrīkst būt vienāda attieksme, ja vien šāda attieksme nav objektīvi attaisnojama. Atšķirīga attieksme ir pamatota, ja tā ir balstīta uz objektīvu un saprātīgu kritēriju, proti, ja tā atbilst leģitīmi

pieņemamam mērķim, kas ir izvirzīts attiecīgajā tiesiskajā regulējumā, un ja šī atšķirība ir samērīga ar mērķi, ko ar attiecīgo attieksmi tiecas sasniegt (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 37.–43. punkts).

EST atzina, ka atšķirīgās attieksmes mērķis varētu būt aizsargāt veselības apdrošināšanas sistēmas finansiālo stabilitāti. Valstij ir jābūt iespējai plānot slimnīcu skaitu, to ģeogrāfisko sadali, organizēšanu un tām piešķirto materiālo nodrošinājumu vai pat to piedāvāto ārstniecības pakalpojumu raksturu, un parasti ar šādu plānošanu tiek apmierinātas dažādas vajadzības. No vienas puses, šīs plānošanas mērķis ir nodrošināt attiecīgās valsts teritorijā pietiekamu un pastāvīgu piekļuvi līdzsvarotas un kvalitatīvas stacionārās aprūpes pakalpojumu klāstam. No otras puses, šai plānošanai vajadzētu nodrošināt izmaksu kontroli un, cik vien iespējams, izvairīšanos no finanšu un tehnisko līdzekļu un cilvēku resursu nelietderīgas izmantošanas. Šāda resursu nelietderīga izmantošana būtu īpaši kaitīga, jo stacionārās aprūpes nozare ir saistīta ar ievērojamām izmaksām un tai ir jāapmierina pieaugošas vajadzības, lai gan finanšu līdzekļi, ko var veltīt veselības aprūpei, nav neierobežoti (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 44.–46. punkts).

Par otro jautājumu EST norādīja, ka Latvijā bija izveidota Direktīvas Nr. 2011/24 8. pantā pieļautā iepriekšējo atļauju sistēma un šīs sistēmas mērķis bija nodrošināt izmaksu kontroli un garantēt pietiekamu un pastāvīgu piekļuvi līdzsvarotam kvalitatīvas ārstēšanas pakalpojumu klāstam, un tas ir leģitīmi. Līdz ar to nepieciešams pārbaudīt, vai minētā sistēma aprobežojas tikai ar to, kas ir nepieciešams un samērīgs leģitīmā mērķa sasniegšanai (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 71. punkts).

EST norādīja, ka dalībvalsts nevar atsaukties uz mērķi aizsargāt sociālā nodrošinājuma sistēmas finanšu stabilitāti, lai pamatotu atteikumu piešķirt Direktīvas Nr. 2011/24 8. panta 1. punktā paredzēto atļauju tādos apstākļos, kā pieteicēja gadījumā (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 72.–78. punkts).

Turklāt attiecībā uz mērķi saglabāt veselības aprūpes jaudu vai medicīnisko kompetenci "iesniedzējtiesai ir jāizvērtē, vai Latvijas iepriekšējās atļaujas sistēma, ar kuru tiek ieviests Direktīvas Nr. 2011/24 8. panta 1. punkts, attiecas tikai uz to, kas ir nepieciešams un samērīgs šī mērķa sasniegšanai, tad, ja piederības dalībvalsts ir atteikusies segt pacientam radušās pārrobežu stacionārās aprūpes izmaksas tādā apmērā, kādā tās būtu segtas identiskas aprūpes sniegšanas gadījumā šajā dalībvalstī" (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 79. punkts).

Ja Latvijas tiesas konstatētu, ka iepriekšējo atļauju sistēma nepārsniedza to, kas bija nepieciešams un samērīgs šā leģitīmā mērķa sasniegšanai, tad būtu nepieciešams vērtēt arī to, vai atļaujas atteikšanas gadījumā, kad Latvijā var nodrošināt medicīniski efektīvu ārstēšanu, taču šī ārstēšana neatbilst personas reliģiskajai pārliecībai, netiek pieļauts diskriminācijas aizlieguma pārkāpums. EST norādīja, ka arī šādā gadījumā atteikums

izsniegt atļauju un atlīdzināt izdevumus rada netiešu atšķirīgu attieksmi reliģijas dēļ. Spriedumā arī skaidrots: tā kā šai atšķirīgajai attieksmei ir leģitīms mērķis – saglabāt veselības aprūpes jaudu un medicīnisko kompetenci –, Latvijas tiesām ir jāizvērtē, vai minētā atšķirīgā attieksme bija samērīga, tostarp, vai pacientu reliģiskās pārliecības ņemšana vērā, īstenojot Direktīvas Nr. 2011/24 8. panta 5. punktu un 6. punkta "d" apakšpunktu, radītu risku stacionārās ārstēšanas plānošanai Latvijā (Eiropas Savienības Tiesas spriedums lietā Nr. C-243/19, 2020. gada 29. oktobris, 81.–84. punkts).

Augstākās tiesas Senāta spriedums pamatlietā

Pēc EST sprieduma saņemšanas Augstākās tiesas Senāts ar 2020. gada 27. novembra spriedumu lietā Nr. A420281216 (SKA-18/2020) nosprieda atcelt AAT 2017. gada 10. februāra spriedumu un nosūtīt lietu jaunai izskatīšanai apelācijas instances tiesai. Augstākās tiesas Senāta spriedumā arī norādīts uz vairākiem AAT procesuāliem pārkāpumiem.

Augstākās tiesas Senāts norādīja, ka nav pamatots AAT secinājums, ka pieteicējs sākotnēji nav prasījis izdevumu atmaksu, kā tas paredzēts noteikumu Nr. 1529 328. punktā (atbilstoši noteikumu Nr. 1529 323. punktam – *L. Š. piebilde*), līdz ar to jautājums nevar tikt izvērtēts. Augstākās tiesas Senāts vērsa uzmanību, ka EST spriedumā ir norādīts, ka

> "pieteikumā par veselības aprūpes izdevumu pilnīgu atmaksu saskaņā ar Regulu Nr. 883/2004 netieši, bet noteikti ir ietverts arī izdevumu atmaksāšanas pieprasījums Direktīvas Nr. 2011/24 7. pantā paredzētajās robežās" (Latvijas Republikas Augstākās tiesas Senāta spriedums lietā Nr. A420281216, 2020. gada 27. novembris, 17. punkts).

Tā kā lietā nav strīda par to, ka pieteicējs laikus bija pieprasījis segt izdevumus par pacienta veselības aprūpi Polijā saskaņā ar Regulu Nr. 883/2004, tad secināms, ka atbilstoši EST norādītajam šis pieprasījums ietvēra arī pieprasījumu atlīdzināt izdevumus par pacienta ārstēšanu Polijā atbilstoši Direktīvā Nr. 2011/24 paredzētajam, ja tiek atteikta izdevumu atlīdzināšana, pamatojoties uz Regulu Nr. 883/2004. Līdz ar to, "ja AAT gribēja norādīt, ka pieteicējs nav ievērojis lietas iepriekšējo ārpustiesas izskatīšanas kārtību, tad šāds secinājums nav pamatots" (Latvijas Republikas Augstākās tiesas Senāta spriedums lietā Nr. A420281216, 2020. gada 27. novembris, 17. punkts).

Augstākās tiesas Senāts arī vērsa uzmanību uz to, ka ka AAT nekorekti piemērojusi noteikumu Nr. 1529 normas, norādot, ka izdevumi tiek atlīdzināti tikai tad, ja persona ir saņēmusi iepriekšēju atļauju. Proti, Senāts norādīja, ka AAT, lai pamatotu atļaujas nepieciešamību, ir atsaukusies uz noteikumu Nr. 1529 323.2. punktu, kas cita starpā paredz, ka NVD lemj par iepriekšējas atļaujas izsniegšanu tāda plānveida veselības aprūpes pakalpojuma kā kardioķirurģiskā ārstēšana stacionārā (323.2. punkts) saņemšanai kādā ES, EEZ dalībvalstī vai Šveicē. Taču šī norma ir iekļauta noteikumu Nr. 1529 15. nodaļā, kurā noteikta kārtība, kādā tiek izsniegti dokumenti veselības aprūpes pakalpojumu saņemšanai citā ES, EEZ dalībvalstī vai Šveicē, nevis 16. nodaļā, kurā noteikta kārtība, kādā tiek atlīdzināti izdevumi par citā ES, EEZ dalībvalstī un Šveicē saņemtajiem veselības

aprūpes pakalpojumiem (kurā cita starpā ietverts noteikumu Nr. 1529 328. punkts). AAT nav paskaidrojusi, kāpēc noteikumu Nr. 1529 323. punktā reglamentētā iepriekšējas atļaujas izsniegšanas kārtība tomēr ir attiecināma arī uz izdevumu, kas segti no personīgajiem līdzekļiem, atlīdzināšanu.

> "Ja noteikumi Nr. 1529 tiešām to paredzēja, tad AAT vajadzēja vērtēt, vai šāda sistēma atbilst Direktīvas Nr. 2011/24 prasībām, ko AAT nav darījusi. Ja, veicot minēto izvērtējumu, tiktu secināts, ka sistēma atbilst Direktīvas Nr. 2011/24/ES prasībām, tad būtu nepieciešams vēl vērtēt, vai šī sistēma nepārkāpj diskriminācijas aizlieguma principu, ko AAT nav darījusi" (Latvijas Republikas Augstākās tiesas Senāta spriedums lietā Nr. A420281216, 2020. gada 27. novembris, 12.–19. punkts).

Secinājumi

Raksta nobeigumā, izdarot secinājumus par nacionālo tiesu darbu, autore vispirms vēlētos vērst uzmanību uz pienākumiem, ko EST ir definējusi dalībvalstu nacionālajām tiesām attiecībā uz ES tiesību normu piemērošanu, proti, ka

> "dalībvalstu nacionālajām tiesām ir pienākums piemērot ES tiesību aktus, it īpaši gadījumos, kad jāaizsargā tiesības, ko tie piešķir indivīdiem. Dalībvalsts tiesa nedrīkst piemērot nevienu valsts tiesību normu, kas būtu pretrunā ar ES tiesībām, neatkarīgi no tā, vai tā pieņemta pirms ES tiesību normām vai pēc tām. Valsts tiesai, kurai saskaņā ar savu kompetenci jāpiemēro ES tiesību normas, ir pienākums nodrošināt šo normu pilnīgu iedarbību, vajadzības gadījumā – pēc savas iniciatīvas nepiemērojot pretrunīgu valsts tiesību normu, pat tad, ja tā ir pieņemta vēlāk, un tiesai nav jāprasa vai jāgaida, lai pirms tam šāda norma tiktu atcelta ar likumdošanas vai citiem konstitucionāliem līdzekļiem, piemēram, EST spriedums lietā *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, ar kuru sākotnēji tika iedibināti šie pienākumi" (Eiropas Savienības Tiesas spriedums lietā Nr. C-106/77, 1978. gada 9. marts, 21., 29. punkts).

Nacionālajā līmenī minētās EST atziņas attiecībā uz ES tiesību aktu piemērošanu administratīvajā procesā varētu tikt saistītas ar Administratīvā procesa likumā nostiprināto objektīvas izmeklēšanas principu un tiesu juridiskās obstrukcijas aizlieguma principu (Administratīvā procesa likums, 2001, 15. panta divpadsmitā daļa, 107. panta ceturtā daļa).

Analizējot Augstākās tiesas Senāta lēmumu pamatlietā un prejudiciālos jautājumus, tika noskaidrots, ka administratīvā procesa tiesas būtība ir tiesas kontrole pār iestādes izdota administratīvā akta tiesiskumu. Lai tiesa šo kontroli spētu īstenot, tai jāievēro objektīvās izmeklēšanas princips, kas noteic, ka nolūkā prasījuma robežās noskaidrot patiesos lietas apstākļus un panākt tiesisku un taisnīgu lietas izskatīšanu tiesa dod administratīvā procesa dalībniekiem norādījumus un ieteikumus, kā arī savāc pierādījumus pēc savas iniciatīvas. Saskaņā ar objektīvās izmeklēšanas principu tiesai ir vispusīgi jānoskaidro lietas izlemšanai būtiskie apstākļi un, ja nepieciešams, pašai jāsavāc pierādījumi vai jādod norādījumi procesa dalībniekiem par pierādījumu iesniegšanas

nepieciešamību. Objektīvās izmeklēšanas principa ietvaros tiesai ir pienākums izlemt, vai esošais pierādījumu kopums ir pietiekams lietas izspriešanai vai ir nepieciešamība pēc papildu pierādījumiem. Šis princips zināmā mērā skatāms kontekstā arī ar patvaļas aizlieguma principu administratīvajā procesā, kas paredz, ka tiesām ir jāsniedz racionāls nolēmuma pamatojums, kas nozīmē to, ka ir jābūt saprotamam, kā tiesa ir nonākusi līdz lietas risinājumam. Nolēmumu var atzīt par neracionālu, ja nav ņemta vērā acīmredzami piemērojama norma vai šī norma tikusi interpretēta sevišķi aplami (Administratīvā procesa likuma komentāri: A un B daļa, 2013, 161–163).

Konkrētajā gadījumā, domājams, AAT ir novirzījusies no pamatlietas būtības, skaidrojot, ka par izraudzītās medicīniskās tehnoloģijas lietošanu un tās sekām ir atbildīga ārstniecības persona, ka operācijas veikšanas metode mākslīgās asinsrites apstākļos nav kļuvusi par visā pasaulē vispārpieņemamu medicīniski pamatotu ārstniecības metodi, kā arī papildu ART argumentācijai norādot uz to, ka bērna tiesības uz dzīvību ir prioritāras pret vecāku tiesībām uz reliģijas brīvību. Šie jautājumi, autores ieskatā, neattiecas uz lietas būtību un racionāli nepamato to, kāpēc iestādes ir pareizi piemērojušas tiesību normas, atsakot pieteicējam izsniegt S2 veidlapu.

Papildus Augstākās tiesas Senāta spriedumā pamatlietā norādītajam, kas attiecas uz AAT nepamatoto tiesību normu interpretāciju, jāpievērš uzmanība tam, ka AAT nepareizi piemērojusi arī PTL normas, proti, PTL 4. panta sesto daļu, norādot, ka saskaņā ar šo tiesību normu pacientam ir tiesības saņemt veselības stāvoklim atbilstošus aprūpes pakalpojumus. Autore skaidro, ka PTL 4. panta sestā daļa reglamentē pacienta tiesības saņemt informāciju par sniegto ārstniecību un tās pabeigšanas pamatojumu, kā arī turpmāko ārstniecību un sociālajiem pakalpojumiem. "Normas mērķis ir aizsargāt pacienta tiesības saņemt atgriezenisko saikni ārstniecības procesā no veselības aprūpes pakalpojuma sniedzēja, kuru viņš sagaida, vēršoties pēc palīdzības, un nodrošināt ārstniecības nepārtrauktību" (Šāberte, Strazdiņa, 2019, 54).

Pacienta tiesības saņemt veselības stāvoklim atbilstošu ārstniecību reglamentē PTL 5. panta pirmā daļa, kas ietver arī valsts pienākumu nodrošināt to, lai pacienti veselības aprūpes pakalpojumus saņemtu bez jebkādas diskriminācijas (Vilka, 2019, 66). Turklāt vēl jānorāda, ka PTL ir ietverta atsauce uz saistošajiem ES tiesību instrumentiem, piemēram, Direktīvu Nr. 2011/24/ES un Padomes 2000. gada 29. jūnija Direktīvu Nr. 2000/43/EK, ar ko ievieš vienādas attieksmes principu pret personām neatkarīgi no rasu vai etniskās piederības, kuras mērķis arī ir ieviest vienādas attieksmes principu ES dalībvalstīs un novērst diskrimināciju atkarībā no rasu un etniskās piederības, un tā uz veselības aprūpes jomu attiecināma tiktāl, ciktāl tā skar piekļuvi precēm un pakalpojumiem un to nodrošināšanu (Pacientu tiesību likums, 2009).

Lai gan PTL ietverto ES tiesību aktu, no kuriem izriet PTL ietvertais regulējums, nav izsmeļošs, autore pauž nostāju, ka AAT, precīzi analizējot nacionālos un ES normatīvos aktus, kas attiecas uz pamatlietu, varēja nonākt pie secinājuma, ka pamatlietā ir jāanalizē, vai potenciāli nav ticis pieļauts diskriminācijas aizlieguma principa pārkāpums.

Autores ieskatā, objektīvās izmeklēšanas ietvaros AAT varēja no VM pieprasīt pierādījumus, lai noskaidrotu, vai atteikums izsniegt S2 veidlapu, kā arī atteikums veikt no personiskajiem līdzekļiem izdoto līdzekļu par pārrobežu veselības aprūpes pakalpojumu atmaksu, konkrētajā gadījumā ir objektīvi pamatots ar leģitīmu mērķi saglabāt veselības aprūpes jaudu vai medicīnisko kompetenci, tādējādi izdarot secinājumus par diskriminācijas aizlieguma principa pārkāpuma esību vai neesību. Iespēju noskaidrot šos jautājumus vēl jo vairāk pamato apstāklis, ka VM savos paskaidrojumos AAT bija norādījusi, ka veselības aprūpes pakalpojumu nodrošinājuma apjoms ir saistīts ar finansējuma apjomu un ka citā valstī sniegtais pakalpojums, ko apmaksā veidlapas S2 izsniegšanas gadījumā, rada sekas, ka valstij jāsedz visas izmaksas saskaņā ar Polijā noteiktajām izmaksām, iztērējot lielākus finanšu līdzekļus, kas nozīmē, ka papildu iztērētie līdzekļi tiks atņemti citai Latvijas sabiedrības daļai. Savukārt pieteicējs savos paskaidrojumos saistībā ar minēto norādīja, ka atteikums izsniegt S2 veidlapu ir novedis pie situācijas, ka, neatsakoties no savas reliģiskās pārliecības, viņam nav iespējams saņemt veselības aprūpes pakalpojumu Latvijā, kā arī nav iespējams saņemt finansējumu vai kompensāciju veselības aprūpes pakalpojuma saņemšanai Polijas ārstniecības iestādē, vismaz tajā vērtībā, kāda būtu Latvijā sniegtam pakalpojumam. Tādējādi finanšu līdzekļi, kuri pieteicējam pienākas no valsts, netiek iztērēti pieteicēja labā. Šādu situāciju nevar atzīt par taisnīgu, jo pieteicējam nav nodrošināta vienlīdzīga pieejamība medicīnas pakalpojumiem (Administratīvās apgabaltiesas spriedums lietā Nr. A420281216, 2017. gada 10. februāris, 2.6., 3.6. punkts).

Pastāvot šādiem apstākļiem, autore pauž nostāju, ka, iespējams, veicot efektīvu objektīvo izmeklēšanu un noskaidrojot visus lietas faktiskos apstākļus diskriminācijas aizlieguma kontekstā, jautājumus EST par ES tiesību normu interpretāciju prejudiciāla nolēmuma taisīšanai, bija iespējams uzdot jau pamatlietas izskatīšanas laikā AAT. Papildus minētajam, autores ieskatā, šajā lietā būtu piešķirama nozīme ne tikai objektīvās izmeklēšanas principam, bet arī iestāžu un tiesu juridiskās obstrukcijas aizliegumam administratīvajā procesā. Saskaņā ar juridiskās obstrukcijas aizliegumu administratīvajā procesā iestāde un nacionālā tiesa nedrīkstētu atteikties izlemt jautājumu, pamatojoties tikai uz to, ka šis jautājums nav noregulēts ar likumu vai citu ārējo normatīvo aktu. Atbilstoši juridiskās obstrukcijas aizliegumam tajā gadījumā, ja likums pats par sevi taisnīgi neatrisina tiesisku problēmu un ja iestāde šo problēmu nav varējusi atrisināt, tad tiesai ir pienākums "saskaņā ar praktiskā saprāta robežām un sabiedrības fundamentālajiem vispārējiem taisnīguma priekšstatiem" to atrisināt. Tiesnešu darbība neaprobežojas ar likumdevēja lēmumu izzināšanu un pasludināšanu. Tiesai ir jāparāda sabiedrības vērtību priekšstatus, kas "raksturīgi konstitucionālajai tiesību sistēmai, bet rakstītajos likumos neatspoguļojas nemaz vai ir nepilnīgi" (Administratīvā procesa likuma komentāri: A un B daļa, 2013, 259).

Konkrētajā gadījumā gan iestādes, gan nacionālās tiesas pamatojās uz apsvērumu, ka personas reliģiskā pārliecība kā kritērijs nav minēts normatīvajos aktos, lai izvērtētu jautājumu par iepriekšējas atļaujas izsniegšanu vai no personiskajiem līdzekļiem veikto izdevumu atmaksu par pārrobežu veselības aprūpes pakalpojumu saņemšanu, līdz ar to uzskatīja, ka tas nav jāņem vērā un nav jāizvērtē. Tomēr tiesības uz reliģijas brīvību ir daļa no cilvēktiesībām un tās konstitucionālā līmenī ir nostiprinātas Satversmē, kā arī attiecībā uz tām skaidri attiecas diskriminācijas aizlieguma princips, tāpēc iestādēm un tiesām bija pienākums to izvērtēt.

Jāuzsver, ka uz raksta sagatavošanas un iesniegšanas brīdi nav zināms, kāds ir AAT nolēmums pēc Augstākās tiesas Senāta sprieduma pamatlietā (tas vēl nav pieņemts). Tomēr secināms, ka AAT ir jāveic visaptveroša pierādījumu analīze, lai varētu identificēt, vai konkrētajā gadījumā valsts rīcība bija tiesiski attaisnojama.

Pateicība

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Ārstniecības personas tiesības paust savu reliģisko pārliecību darba tiesiskajās attiecībās

Right of Medical Practitioner to Express Their Religious Beliefs in Employment Relations

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Abstract

The rights of medical practitioners are broadly defined in both national and international legislation. The scope of the rights of medical practitioners is evolving along with the development of certain sub-sectors of the field of law. One of the topical issues in the context of the exercise of the rights of medical practitioners is the right of medical practitioners to express their religious beliefs from the Labor law perspective. The right of medical practitioners to freedom of religion is to be seen as part of human rights as well. Member States that have acceded to human rights instruments that protect the right to freedom of religion do not have the right to intervene and take coercive measures to change these views. The right to freedom of religion at the level of human rights applies to a medical practitioner as an individual living in a democratic society and as a person with a medical education who is engaged in medical treatment or prevention, diagnosis and treatment, medical rehabilitation and patient care has rights and obligations within

the framework of the activity. The aim of the article is to study the right of medical practitioners to express their religious beliefs in employment relations, as well as to identify problematic issues researching the case law of the CJEU and the ECtHR.

Keywords: expression of religion, medical practitioner, medical law, labour law, prohibition of discrimination.

Ievads

Ārstniecības personu tiesības ir plaši definētas gan nacionālos, gan arī starptautiskos tiesību aktos. Ārstniecības personu tiesību tvērums attīstās līdztekus atsevišķām tiesību zinātnes apakšnozarēm. Viens no aktuāliem jautājumiem ārstsniecības personu tiesību realizēšanas kontekstā ir ārstniecības personu tiesības paust savu reliģisko pārliecību darba tiesiskajās attiecībās. Ārstniecības personu tiesības uz reliģijas brīvību ir vērtējamas kā daļa no cilvēktiesībām. Dalībvalstīm, kuras pievienojušās cilvēktiesību instrumentiem, ar kuriem tiek aizsargātas tiesības uz reliģijas brīvību, nav tiesību iejaukties un veikt piespiedu pasākumus, lai šos uzskatus mainītu. Dalībvalsts nedrīkst noteikt indivīdam, kam viņam būtu jātic, nedrīkst piespiest uzņemties saistības un nedrīkst veikt nekāda veida piespiedu pasākumus, kā arī piemērot sodu, vērst vardarbību vai piedāvāt indivīdam noteikta veida labumus, lai viņš mainītu savu pārliecību, kā arī nedrīkst veikt izmeklēšanu, lai atklātu viņa iekšējo ticību, un piemērot sankcijas, lai mazinātu vai mainītu viņa reliģisko pārliecību.

Vērtējot līdzsvaru starp ārstniecības personas pamattiesību ierobežojumu un labumu, ko gūst sabiedrība (konkrētajā gadījumā pacients) noteiktā ierobežojuma gadījumā, ir jāizskata arī diskriminācijas aizlieguma principu ievērošana. Minētais attiecināms arī uz ārstniecības personas tiesībām paust savu reliģisko pārliecību darba tiesiskajās attiecībās. Jāatzīmē, ka tiesības uz reliģijas brīvību cilvēktiesību līmenī uz ārstniecības personu ir attiecināmas kā uz demokrātiskā sabiedrībā dzīvojošu indivīdu un kā uz personu, kam ir medicīniskā izglītība un kas nodarbojas ar ārstniecību jeb individuālu slimību profilaksi, diagnostiku un ārstēšanu, medicīnisko rehabilitāciju un pacientu aprūpi, un kam profesionālās darbības ietvaros piemīt tiesības un pienākumi. Ārstniecības persona, ja vien tā nav nodibinājusi ārstniecības iestādi un individuāli neveic, piemēram, fiziskās personas saimniecisko darbību, ir darbinieki jeb personas, kas uz darba līguma pamata par nolīgto darba samaksu veic noteiktu darbu darba devēja vadībā.

Darba tiesībās, tostarp nodarbinātības jautājumos, diskriminācijas aizliegumu regulē Darba likums, kurā noteikts, ka ikvienam darbiniekam ir vienlīdzīgas tiesības uz darbu, kā arī taisnīgiem, drošiem un veselībai nekaitīgiem darba apstākļiem. Tas nozīmē, ka darba devējam šīs tiesības darbiniekiem ir jānodrošina bez jebkādas tiešas vai netiešas diskriminācijas, turklāt neatkarīgi no darbinieka reliģiskās pārliecības; tas attiecināms arī uz ārstniecības personām. Attiecībā uz reliģisko pārliecību darba tiesisko attiecību nodibināšanā likumdevējs iekļāvis īpašu regulējumu.

Ņemot vērā, ka reliģiskās pārliecības paušana darba tiesiskajās attiecībās nereti var būt tiesiska strīda iemesls, rakstā uzmanība īpaši pievērsta atsevišķiem piemēriem Eiropas Savienības Tiesas (turpmāk – EST) un Eiropas Cilvēktiesību tiesas (turpmāk – ECT) praksē, kā arī nacionālajā līmenī reliģiskā apģērba un simbolu nēsāšanas, reliģiskās darbības veikšanas un atšķirīga darba laika ievērošanas kontekstā, kas nereti ir strīdus iemesls. Raksta mērķis ir izpētīt ārstniecības personu tiesības paust savu reliģisko pārliecību darba tiesiskajās attiecībās, kā arī EST un ECT praksi un identificēt problēmjautājumus. Raksta empīrisko bāzi veido zinātniskie darbi un rakstu krājumu materiāli, tiesību akti, EST un ECT prakse, publikācijas periodiskajos izdevumos un pirmavoti, interneta resursi. Raksta izstrādē tika izmantota analītiskā, induktīvā un deduktīvā pētniecības metode, kā arī tiesību normu interpretācijas metodes.

1. Tiesības uz reliģijas brīvību kā daļa no cilvēktiesībām

Tiesības uz domas, apziņas un reliģiskās pārliecības brīvību (turpmāk – tiesības uz reliģijas brīvību) ietilpst cilvēktiesību tvērumā (Renucci, 2005), un tās ir nostiprinātas, piemēram, šādos Apvienoto Nāciju Organizācijas un Eiropas Padomes normatīvajos aktos: Apvienoto Nāciju Organizācijas Vispārējā cilvēktiesību deklarācijā (Apvienoto Nāciju Organizācijas Vispārējā cilvēktiesību deklarācija, 1948, 18. pants), Starptautiskajā paktā par pilsoņu un politiskajām tiesībām (Starptautiskais pakts par pilsoņu un politiskajām tiesībām, 2003, 18. pants), Eiropas Cilvēka tiesību un pamatbrīvību aizsardzības konvencijā (turpmāk – ECPAK) (Eiropas Cilvēka tiesību un pamatbrīvību aizsardzības konvencija, 1950). Eiropas Savienībā tiesības uz reliģijas brīvību ir nostiprinātas Eiropas Savienības pamattiesību hartā (turpmāk – Pamattiesību harta), un saskaņā ar hartā noteikto šīm tiesībām ir jāatbilst ECPAK noteiktajām tiesībām un tās ir jāinterepretē saskaņā ar dalībvalstu kopējām konstitucionālajām tradīcijām, ņemot vērā to, ka Eiropas Savienībā (turpmāk – ES) tiek respektēta kultūru, reliģiju un valodu daudzveidība (Eiropas Savienības Pamattiesību harta, 2012, 10. pants, 52. panta trešā daļa, 22. pants). Dalībvalstīm, kuras pievienojušās minētajiem cilvēktiesību instrumentiem, tostarp arī Latvijai, ir pienākums nodrošināt cilvēktiesību efektīvu aizsardzību un respektēt tiesības uz reliģijas brīvību (Šāberte, 2017). "Latvijas tiesību sistēmu raksturo atvērtība starptautiskajām tiesībām." (Latvijas Republikas Satversmes tiesas tiesnešu Sanitas Osipovas un Inetas Ziemeles atsevišķās domas Satversmes tiesas 2016. gada 13. maija spriedumā lietā Nr. 2015-19-01, 2016) Saskaņā ar Satversmes 89. pantu Latvija atzīst un aizsargā cilvēka pamattiesības saskaņā ar Satversmi, likumiem un Latvijai saistošiem starptautiskajiem līgumiem (Latvijas Republikas Satversme, 1922, 89. pants), un tādējādi cilvēka tiesības uz reliģijas brīvību ir nostiprinātas Satversmes 99. pantā (Latvijas Republikas Satversme, 1922, 99. pants).

Demokrātiskā sabiedrībā, kur vienlaikus var pastāvēt vairākas reliģijas, ir nepieciešams nodrošināt šo reliģiju līdzāspastāvēšanu (European Court of Human Rights, 2019, p. 17). Tādējādi dalībvalstīm, kuras pievienojušās minētajiem cilvēktiesību instrumentiem,

tiesību uz reliģijas brīvību jomā ir pozitīvi un negatīvi pienākumi. Pozitīvie pienākumi ietver valsts nepieciešamo rīcību, lai nodrošinātu efektīvu tiesību uz reliģijas brīvību īstenošanu. Piemēram, dalībvalstīm ir pienākums novērst diskrimināciju reliģiskās pārliecības dēļ un noteikt kārtību, kādā tiktu izmeklēti un sodīti pārkāpumi, tostarp noziedzīgi nodarījumi, kas veikti, pamatojoties uz personas reliģisko pārliecību (The Council of the European Union, 24.06.2013, p. 5). Savukārt pie negatīvajiem pienākumiem var minēt dalībvalstu atturēšanos no iejaukšanās tiesību uz reliģijas brīvību jomā. Tostarp dalībvalstīm ir pienākums aizsargāt personas pamattiesības no citu privātpersonu iejaukšanās tajās. Dalībvalstīm ir jābūt neitrālām, sniedzot iespēju katram indivīdam pieņemt vai nepieņemt reliģiju atbilstoši viņa pārliecībai (Derek, 2002, p. 224–225). Tomēr dalībvalsts neitralitāti nevar uzskatīt par tādu, kurā valsts nekādos apstākļos nevarētu iejaukties tiesību uz reliģijas brīvību jomā, un tas ir saistāms ar apstākli, ka tiesībām uz reliģijas brīvību ir divas izpausmes formas:

1) *forum internum* (latīņu val.) – iekšējā izpausme, kas ir absolūta un nedrīkst tikt ierobežota;
2) *forum externum* (latīņu val.) – ārējā izpausme, kas ir reliģiskās pārliecības paušana vai manifestācija (no angļu val. *manifestation*), kurai var būt ietekme uz citu personu tiesiskajām interesēm un kura var tikt ierobežota (European Court of Human Rights, 2019, p. 17).

Tiesību uz reliģijas brīvību iekšējā izpausme ietver tiesības brīvi mainīt un pieņemt savu reliģisko pārliecību vai ticību pēc savas izvēles, un cilvēktiesību instrumenti šo izvēli kopumā aizsargā kā absolūtu, kas nozīmē, ka tā nedrīkst tikt ierobežota (Vermeulen, van Roosmalen, 2018, p. 22). Uz tiesību uz reliģijas brīvību iekšējo izpausmi ir attiecināms "prozelītisma aizliegums". Tas nozīmē, ka dalībvalstīm, kuras pievienojušās cilvēktiesību instrumentiem, kuri aizsargā tiesības uz reliģijas brīvību, nav tiesību iejaukties un veikt piespiedu pasākumus, lai šos uzskatus mainītu. Dalībvalsts nedrīkst noteikt indivīdam, kam viņam būtu jātic, nedrīkst piespiest uzņemties saistības un nedrīkst veikt nekāda veida piespiedu pasākumus, kā arī piemērot sodu, vērst vardarbību vai piedāvāt indivīdam noteikta veida labumus, lai viņš mainītu savu pārliecību, kā arī nedrīkst veikt izmeklēšanu, lai atklātu viņa iekšējo ticību, un piemērot sankcijas, lai mazinātu vai mainītu viņa reliģisko pārliecību (D'Almeida Ribeiro, Amor, Jahangir, Heiner, 2011, p. 2). Piemēram, dalībvalsts nedrīkst atzīt par leģitīmu tādu ārstniecības iestādes kā ārstniecības personas darba devēja rīcību, ar kuru ārstniecības persona ir tikusi piespiesta mainīt reliģisko pārliecību, lai tā varētu turpināt darba tiesiskās attiecības ārstniecības iestādē (Šāberte, 2017, 105. lpp.).

Savukārt tiesību uz reliģijas brīvību ārējā izpausme jeb uzskatu paušana sevī ietver brīvību gan vienatnē, gan arī kopā ar citiem publiski vai privāti paust savu reliģisko pārliecību vai uzskatus, sludinot tos, piedaloties reliģiskās ceremonijās un rituālos (Robinson, 2007, p. 73). Par reliģiskās pārliecības paušanu ir uzskatāmas tādas darbības, kas ietver aktīvu darbību paust savu reliģisko pārliecību vai uzskatus, sludinot tos, piedaloties reliģiskās ceremonijās un rituālos (*freedom to worship* – angļu. val.), un tiesības uz vietu,

kur nodoties reliģijai (*place of worship* – angļu val.) (D'Almeida Ribeiro, Amor, Jahangir, Heiner, 2011, p. 2). Reliģiskās pārliecības paušana ietver sevī ne tikai piedalīšanos reliģiskās ceremonijās un rituālos, bet arī reliģisku simbolu, piemēram, reliģiski rituālu ceremoniālu priekšmetu izmantošanu, reliģiska apģērba un priekšmetu nēsāšanu ikdienā, svētku un atpūtas dienu, kā arī dzīvesveida, kas pamatojams reliģijā, ievērošanu – ēšanas paradumu ievērošanu, noteiktas valodas lietošanu, ārstniecības veikšanu (Tahzib, 1996, p. 70).

Jāņem vērā, ka tiesības uz reliģijas brīvību neaizsargā visus viedokļus, idejas un darbības, kas tiek subjektīvi motivētas ar reliģisku pārliecību vai tās izpausmi (Vermeulen, van Roosmalen, 2018, p. 737). Tas nozīmē, ka ne katra indivīda rīcība, kuru motivē reliģija, ir uzskatāma par reliģijas paušanu. Lai darbību varētu uzskatīt par reliģijas paušanu, tai jābūt pamatotai ar nepieciešamību ārēji paust savu pārliecību. Reliģijas paušana ietver reliģijas praktizēšanu, kas pamatojama indivīda dzīvesveidā, kas savukārt pamatojama ar viņa rīcību atbilstoši viņa uzskatiem (Vermeulen, van Roosmalen, 2018, p. 737). ECT ir atzinusi, ka ECPAK 9. pants neaizsargā visas darbības, kuras indivīds veic, pamatojoties uz saviem reliģiskajiem uzskatiem, bet vienīgi tādas, kas veido reliģijas paušanu vispārīgi akceptētā veidā, piemēram, dievkalpojums (Eiropas Cilvēktiesību tiesas 2013. gada 15. janvāra spriedums lietā *Eweida and Others vs. the United Kingdom*). Viedokļiem jāsasniedz noteikts piesardzības, nopietnības, saliedētības un nozīmīguma līmenis (Grabenwarter, 2014, p. 240), un tiem ir jābūt saistītiem ar reliģiju, lai tos varētu atzīt par aizsargājamiem (Vermeulen, van Roosmalen, 2018, p. 737). Tāpat ECT ir atzinusi, ka pietiekami precīza un tieša saikne ar reliģiju ir jānosaka, pamatojoties uz katra gadījuma faktiem. Ne pieteikuma iesniedzējiem, ne ECT nav pienākuma pierādīt, vai attiecīgo praksi var uzskatīt par reliģiju. Šāds pienākums gulstas uz attiecīgo dalībvalsti, kurai ar pārliecinošiem pierādījumiem ir jāpamato, vai attiecīgā prakse, par kuru ir strīds, dalībvalstī ir vai nav uzskatāma par reliģijas paušanu, kas stingri pamatota reliģijā (Eiropas Cilvēktiesību tiesas 2013. gada 15. janvāra spriedums lietā *Eweida and Others vs. the United Kingdom*).

Visbiežāk jautājums par to, vai indivīda ticība ietilpst tiesību uz reliģijas brīvību tvērumā, aktualizējas gadījumos, kad tiek analizēta indivīda ārējā izpausme, kurai ir ietekme uz apkārtējiem (Doe, 2011, p. 51). Valsts var iejaukties un ierobežot reliģiskās pārliecības paušanu, ja tai ir negatīva ietekme uz sabiedrību un uz konstitucionālajām vērtībām, kuras ir nepieciešams aizsargāt reliģiskās pārliecības paušanas dēļ. Nosakot, vai noteiktais reliģiskās pārliecības paušanas ierobežojums ir tiesisks, ir nepieciešams izvērtēt:

1) vai tas ir noteikts ar likumu vai uz likuma pamata;
2) vai tam ir leģitīms mērķis;
3) vai tas ir samērīgs (Vermeulen, van Roosmalen, 2018, p. 738).

> "Ja izvērtējuma rezultātā tiek atzīts, ka norma, kura noteic ierobežojumu reliģiskās pārliecības paušanai, neatbilst kaut vienam no nosauktajiem kritērijiem, ir atzīstams, ka šī norma neatbilst arī samērīguma principam un ir prettiesiska. Izšķiroša nozīme ir nevis tam, ka, nosakot aizliegumu, valsts formāli ir izpildījusi savus pozitīvos pienākumus reliģijas brīvības efektīvas īstenošanas jomā, bet gan tam, vai noteiktais ierobežojums ir tiesisks" (Šāberte, 2017, 108. lpp.).

Jānorāda, ka, vērtējot līdzsvaru starp indivīda (konkrētajā gadījumā ārstniecības personas) pamattiesību ierobežojumu un labumu, ko gūst sabiedrība (konkrētajā gadījumā pacients) noteiktā ierobežojuma gadījumā, ir jāskata arī diskriminācijas aizlieguma principu ievērošana (Šāberte, 2017, 108. lpp.). Tas pamatojams ar apstākli, ka darba tiesību jomā var pastāvēt tiesiski strīdi par to, vai darba devējs (konkrētajā gadījumā ārstniecības iestāde) attiecībā pret darbinieku (konkrētajā gadījumā ārstniecības persona) potenciāli nav pieļāvis diskriminācijas aizlieguma pārkāpumus viņa reliģiskās pārliecības dēļ.

2. Ārstniecības personas tiesības paust savu reliģisko pārliecību: vispārīgs raksturojums darba tiesisko attiecību kontekstā

Tiesības uz reliģijas brīvību cilvēktiesību līmenī uz ārstniecības personu ir attiecināmas, pirmkārt, kā uz demokrātiskā sabiedrībā dzīvojošu indivīdu, otrkārt, kā uz personu, kam ir medicīniskā izglītība un kas nodarbojas ar ārstniecību jeb individuālu slimību profilaksi, diagnostiku un ārstēšanu, medicīnisko rehabilitāciju un pacientu aprūpi, un kurai profesionālās darbības ietvaros piemīt tiesības un pienākumi (Ārstniecības likums, 1997, 1. panta 1. un 2. punkts). Latvijā ārstniecības personu profesiju loku reglamentē virkne normatīvo aktu, piemēram, Ārstniecības likums, likums "Par reglamentētajām profesijām un profesionālās kvalifikācijas atzīšanu", Ministru kabineta 2006. gada 6. jūnija noteikumi Nr. 460 "Noteikumi par specialitāšu, apakšspecialitāšu un papildspecialitāšu sarakstu reglamentētajām profesijām". Reglamentētās ārstniecības personu profesijas Latvijā, kurām minimālās prasības profesionālās kvalifikācijas iegūšanai nosaka Ministru kabinets, ir, piemēram, ārsts, zobārsts, vecmāte, savukārt reglamentētās profesijas, kurās kvalifikācijas prasības nosaka akreditētas izglītības programmas un likumā noteiktajos gadījumos – profesionālās sertifikācijas noteikumi, ir, piemēram, fizioterapeits, kosmētiķis, podologs, masieris (Likums "Par reglamentētajām profesijām un profesionālās kvalifikācijas atzīšanu", 2001). Ārstniecības personai tiesības uz reliģijas brīvību, tostarp uz reliģijas paušanu, piemīt neatkarīgi no ārstniecības personas profesijas, kurā tā veic ārstniecību.

Ārstniecības persona, ja vien tā nav nodibinājusi ārstniecības iestādi un individuāli neveic, piemēram, fiziskās personas saimniecisko darbību, ir darbinieks jeb persona, kas uz darba līguma pamata par nolīgto darba samaksu veic noteiktu darbu darba devēja vadībā (Darba likums, 2001, 9. pants). Darba devējs Darba likuma (turpmāk – DL) izpratnē ir, piemēram, fiziska vai juridiska persona vai arī tiesībspējīga personālsabiedrība, kas uz darba līguma pamata nodarbina vismaz vienu darbinieku (Darba likums, 2001, 4. panta pirmā daļa). Ievērojot to, ka ārstniecības persona ir persona, ka nodarbojas ar ārstniecību, par tās darba devēju uzskatāma ārstniecības iestāde, kas Ārstniecības likuma izpratnē ir, piemēram, komercsabiedrība, kas var būt, piemēram, kapitālsabiedrība (slimnīca), kas reģistrēta ārstniecības iestāžu reģistrā un atbilst normatīvajos aktos noteiktajām obligātajām prasībām ārstniecības iestādēm un to struktūrvienībām un kura nodrošina ārstniecības pakalpojumus (Ārstniecības likums, 1997, 1. panta 3. punkts). Ārstniecības

persona, atrodoties darba tiesiskajās attiecībās ar iestādi, ir pakļauta virknei prasību, tostarp gan ārstniecības iestādes iekšējiem normatīvajiem aktiem, gan arī ārstniecības iestādei saistošiem ārējiem normatīvajiem aktiem. Tostarp ārstniecības personai ir jāpārzina normatīvie akti, kas reglamentē pacienta tiesības, un uz ārstniecības personu attiecināmās ētikas kodeksā ietvertās normas un jādarbojas saskaņā ar tām (Ašnevica-Slokenberga, Šāberte u. c., 2015, 198.–199. lpp.).

Ņemot vērā iepriekš analizēto reliģiskās pārliecības paušanas ierobežošanas kārtību, jānorāda, ka ārstniecības iestādei, no vienas puses, kā institūcijai ir pienākums nodrošināt ārstniecību un pacienta tiesības, bet, no otras puses, kā ārstniecības personas darba devējam ir pienākums rūpēties, lai gan ārstniecības personas, gan pacienta tiesības varētu tikt sabalansēti īstenotas. Tādējādi, piemēram, var pastāvēt situācijas, ka higiēniskā un epidemioloģiskā režīma prasību, kas ārstniecības iestādēm jāievēro saskaņā ar normatīvajiem aktiem, ievērošanas nolūkos, kā arī pacientu dzīvības un veselības aizsardzības nolūkos ārstniecības personas tiesības paust savu reliģisko pārliecību varētu tikt ierobežotas, piemēram, personālam, tostarp ārstniecības personām, veicot pacientu operācijas operāciju zālē, aizliedzot nēsāt jebkādus reliģiskos simbolus vai reliģisko apģērbu (Hill, Whistler, 2013, p. 3). Vienlaikus jāņem vērā, ka pamattiesību ierobežojumu mērķis ir "atrast taisnīgu un saprātīgu līdzsvaru starp atsevišķas personas pamattiesībām, no vienas puses, un citām konstitucionālajām vērtībām, no otras puses" (Pleps, 2011, 763. lpp.). Tas nozīmē, ka ārstniecības iestādei, ierobežojot reliģiskās pārliecības paušanu, vienmēr jāpārbauda, vai iecerētais mērķis var tikt sasniegts ar mazāk ierobežojošiem līdzekļiem nekā formālu aizliegumu, un tādējādi jātiecas nodrošināt reliģiskās pārliecības paušanas īstenošanu tiktāl, ciktāl tas vien iespējams. Nav pieļaujama ārstniecības personas reliģiskās pārliecības paušanas formāla ierobežošana bez tiesiski attaisnojama nolūka, jo tā var būt par pamatu pārkāpumiem, ko veicina atšķirīgas attieksmes aizliegums.

3. Atšķirīgas attieksmes aizliegums un pieļaujamība darba tiesiskajās attiecībās: vispārīgs raksturojums tiesību uz reliģijas brīvību kontekstā

Personas reliģiskā pārliecība nereti ir diskriminācijas iemesls, tādēļ starptautiskie cilvēktiesību instrumenti, piemēram, iepriekš minētā ANO Deklarācija par jebkuras neiecietības un diskriminācijas, kas balstās uz reliģiju vai pārliecību, izskaušanu (General Assembly resolution, 1981, 36/55 of 25), kā arī tādi normatīvie akti kā ECPAK 1. protokola 2. pants; Starptautiskā pakta par pilsoņu un politiskajām tiesībām 13. panta 3. punkts (Eiropas Cilvēka tiesību un pamatbrīvību aizsardzības konvencija, 1950, 1. protokols) aizliedz atšķirīgu attieksmi (personas tiešu vai netiešu diskrimināciju, aizskaršanu vai norādījumu to diskriminēt personas reliģiskās pārliecības dēļ). ES līmenī "diskriminācijas aizliegums ir vienlīdzīgas attieksmes principa, kas nostiprināts ES Pamattiesību hartas 20. pantā, īpašā izpausme" (Eiropas Savienības Tiesa, 2020, 35. punkts). Atšķirīgas attieksmes aizliegumu darba tiesību jomā ES līmenī regulē, piemēram, ES Padomes

2000. gada 27. novembra Direktīva 2000/78/EK, ar ko nosaka kopēju sistēmu vienlīdzīgai attieksmei pret nodarbinātību un profesiju (Apvienoto Nāciju Organizācijas Starptautiskais pakts par pilsoņu un politiskajām tiesībām, 2003) Eiropas Parlamenta un Padomes 2006. gada 5. jūlija Direktīva 2006/54/EK par tāda principa īstenošanu, kas paredz vienlīdzīgas iespējas un attieksmi pret vīriešiem un sievietēm nodarbinātības un profesijas jautājumos (pārstrādāta versija) (Eiropas Parlamenta un Padomes Direktīva 2006/54/EK, 2005), Padomes 2000. gada 29. jūnija Direktīva 2000/43/EK, ar ko ievieš vienādas attieksmes principu pret personām neatkarīgi no rasu vai etniskās piederības (Padomes Direktīva 2000/43/EK, 2000, p. 22–26).

Nacionālajā līmenī diskriminācijas aizliegums Latvijā nostiprināts Satversmē, kur noteikts, ka "visi cilvēki Latvijā ir vienlīdzīgi likuma un tiesas priekšā. Cilvēka tiesības tiek īstenotas bez jebkādas diskriminācijas" (Latvijas Republikas Satversme, 1922, 81., 91. pants). Vienlīdzības principa neievērošanas aizliegums, konkrēti to attiecinot uz reliģiskās pārliecības brīvību, ir noteikts Reliģisko organizāciju likumā. Tajā norādīts, ka

> "tieša vai netieša iedzīvotāju tiesību ierobežošana vai priekšrocību radīšana iedzīvotājiem, kā arī jūtu aizskaršana vai naida celšana sakarā ar viņu attieksmi pret reliģiju ir aizliegta. Par šī noteikuma pārkāpšanu vainīgās personas saucamas pie atbildības likumos noteiktajā kārtībā" (Reliģisko organizāciju likums, 1995, 4. panta pirmā daļa).

Atšķirīgas attieksmes aizliegums darba tiesiskajās attiecībās nostiprināts Darba likumā, kurā paredzēts, ka ikvienam ir vienlīdzīgas tiesības uz darbu, taisnīgiem, drošiem un veselībai nekaitīgiem darba apstākļiem, kā arī uz taisnīgu darba samaksu. Šīs tiesības nodrošināmas bez jebkādas tiešas vai netiešas diskriminācijas – tostarp neatkarīgi no personas reliģiskās pārliecības (Darba likums, 2001, 7. panta pirmā un otrā daļa).

Saskaņā ar DL

> "atšķirīga attieksme atkarībā no personas reliģiskās pārliecības ir aizliegta, dibinot darba tiesiskās attiecības, kā arī darba tiesisko attiecību pastāvēšanas laikā, it īpaši paaugstinot darbinieku amatā, nosakot darba apstākļus, darba samaksu vai profesionālo apmācību, vai kvalifikācijas paaugstināšanu, kā arī uzteicot darba līgumu" (Darba likums, 2001, 29. panta pirmā un devītā daļa).

Tieša diskriminācija darba tiesiskajās attiecībās pastāv, "ja salīdzināmā situācijā attieksme pret personu saistībā ar tās piederību noteiktai reliģiskai pārliecībai ir, bija vai var būt mazāk labvēlīga nekā pret citu personu" (Darba likums, 2001, 29. panta piektā un devītā daļa). Par tiešu diskrimināciju var atzīt gadījumu, kurā pret kādu personu tiek konstatēta mazāk labvēlīga attieksme nekā pret citām personām, kas atrodas salīdzināmā situācijā, un šādas mazāk labvēlīgas attieksmes iemesls ir, piemēram, personas reliģiskā pārliecība (Latvijas Brīvo arodbiedrību savienība, 2020, 96. lpp.). Tātad tiešā diskriminācija iestājas, ja pret personu attiecas nelabvēlīgi salīdzinājumā ar to, kāda ir vai būtu bijusi attieksme pret citām personām, kuras atrodas līdzīgā situācijā, ja diskriminācijas iemesls ir šīm personām piemītoša noteikta īpašība, kas ir arī "aizsardzības iemesls" (konkrētajā gadījumā tā ir personas reliģiskā pārliecība). Piemēram, par tiešu diskrimināciju būs atzīstama situācija, ja ārstniecības iestāde ar iekšējo normatīvo aktu būs noteikusi, ka

ārstniecības personām, kuras stingri ievēro Pareizticīgo Baznīcas kalendārā noteiktās svētku dienas, ir noteikta zemāka alga nekā citām ārstniecības iestādē strādājošām ārstniecības personām, kuras to neievēro.

> "Netieša diskriminācija darba tiesiskajās attiecībās pastāv, ja šķietami neitrāls noteikums, kritērijs vai prakse rada vai var radīt nelabvēlīgas sekas viena dzimuma personām, izņemot gadījumu, kad šāds noteikums, kritērijs vai prakse ir objektīvi pamatota ar tiesisku mērķi, kura sasniegšanai izraudzītie līdzekļi ir samērīgi" (Darba likums, 2001, 29. panta sestā daļa).

Atšķirīga attieksme var izpausties kā nesamērīgi kaitīga ietekme vispārīgas politikas nostādnes vai pasākuma dēļ, kurš, lai gan ir neitrāli formulēts, tomēr diskriminē kādu grupu (Eiropas Savienības Pamattiesību aģentūra, 2011, 29. lpp.).

> "Netieša diskriminācija ir balstīta uz šķietami neitrālu kritēriju, kurš nav aizliegtais kritērijs, bet faktiski var skart kādu noteiktu cilvēku grupu, uz kuru šis šķietami neitrālais kritērijs tipiskā veidā attiecas. Neitrālajam kritērijam jābūt ciešai saiknei ar aizliegto kritēriju" (Šāberte, 2019, 32. lpp.).

Tiek pieņemts, ka netiešā diskriminācija iestājas tad, kad acīmredzami neitrāls noteikums, kritērijs vai prakse nostāda kādas rasu vai etniskās piederības personas īpaši nelabvēlīgā situācijā, salīdzinot ar citām personām, ja vien šāds noteikums, kritērijs vai prakse nav objektīvi attaisnojams ar tiesisku mērķi un ja vien tas nav proporcionāls un vajadzīgs šāda mērķa sasniegšanas līdzeklis (Eiropas Savienības Pamattiesību aģentūra, 2011). Piemēram, EST spriedumā *G4S Secure Solutions* (Eiropas Savienības Tiesas 2016. gada 31. maija spriedums lietā *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding* pret *G4S Secure Solutions NV, Nr. C-157/15*) un spriedumā *Bougnaoui* (Eiropas Savienības Tiesas 2017. gada 14. marta spriedums lietā *Asma Bougnaoui* un *Association de défense des droits de l'homme* (*ADDH*) pret *Micropole SA Cour de cassation*), kur tika analizēti gadījumi, kad ar darbiniecēm tika izbeigtas darba tiesiskās attiecības, jo viņas darbavietā valkāja islāmisko lakatu, atzina, ka uzņēmums faktiski drīkst iekšējos darba kārtības noteikumos aizliegt saviem darbiniekiem valkāt redzamas politiskas, filosofiskas un reliģiskas atšķirības zīmes. Šāds vispārīgs aizliegums nav tieša diskriminācija. Tomēr tas var būt netieša diskriminācija, ja tā rezultātā tiek radītas konkrētas nelabvēlīgas sekas personām, kuras ir piederīgas kādai konkrētai reliģijai. Tomēr pat šādā gadījumā aizliegums var tikt attaisnots, ja darba devējs ievēro neitralitātes politiku attiecībās ar saviem klientiem un ja aizliegums attiecas vienīgi uz darbiniekiem, kuri ir vizuālā saskarsmē ar klientiem. Darba devējam vajadzības gadījumā ir jāpārliecinās, vai tas var piedāvāt attiecīgajai personai darbavietu, kurā šādas saskarsmes nav. Darba devēja gluži vienkārša vēlēšanās apmierināt klienta vēlmi vairs nesaņemt apkalpošanu no darbinieces, kas valkā islāmisko lakatu, nav uzskatāma par tādu ar profesiju saistītu prasību, kas izslēgtu diskriminācijas esamību (Eiropas Savienības Tiesa, 2020).

Personas aizskaršana darba tiesiskajās attiecībās ir personas pakļaušana tādai no šīs personas viedokļa nevēlamai rīcībai, kas saistīta ar tās piederību pie noteikta dzimuma,

tostarp seksuāla rakstura rīcībai, ja šādas rīcības mērķis vai rezultāts ir personas cieņas aizskaršana un iebiedējošas, naidīgas, pazemojošas, degradējošas vai aizskarošas vides radīšana (Darba likums, 2001, 29. panta septītā daļa). Šādā izpratnē skaidrojams, ka "jebkurš rīkojums diskriminēt ir diskriminācija" (Ales, Bell, Deinert, Robin-Oliver, 2018, p. 504–505). Personas aizskaršana ir personas pakļaušana tādai no šīs personas viedokļa nevēlamai rīcībai, kas saistīta ar kādu no aizliegtajiem diskriminācijas pamatiem. Šāda rīcība ir, piemēram, "naidīga, pazemojoša un iebiedējoša izturēšanās. Savukārt norādījums diskriminēt personu ir diskriminācijas veids, kas konstatējams gadījumos, kad tiek dots norādījums citai personai diskriminēt personu, pamatojoties uz kādu no aizliegtajiem kritērijiem – konkrētajā gadījumā reliģisko pārliecību" (Šāberte, 2019, 33. lpp.).

Par šādu rīcību var uzskatīt, piemēram, slimnīcā izdotu rīkojumu nepieņemt darbā ārstniecības personas, kuras savas reliģiskās pārliecības dēļ valkā seju aizsedzošu apģērbu.

Saskaņā ar DL atšķirīga attieksme atkarībā no personas reliģiskās pārliecības ir pieļaujama tikai vienā gadījumā – proti, reliģiskajā organizācijā, ja noteikta veida reliģiskā pārliecība ir attiecīgā darba veikšanas vai attiecīgās nodarbošanās objektīvs un pamatots priekšnoteikums, ņemot vērā organizācijas ētosu (Darba likums, 2001, 29. panta desmitā daļa). Piemēram, vispārīgā izpratnē saskaņā ar Reliģisko organizāciju likumu reliģiskās organizācijas ir reģistrētās draudzes, reliģiskās savienības (baznīcas) un diecēzes (Reliģisko organizāciju likums, 1995, 3. panta pirmā daļa). Saskaņā ar DL tās var piemērot atšķirīgu attieksmi, tikai pamatojoties uz reliģiskās pārliecības kritēriju; piemēram, "pieņemot darbā liturģijas komisijas vadītāju, kurš piedalās reliģiskajās ceremonijās, personas reliģiskajai pārliecībai, kā arī piederībai pie noteiktas reliģiskās organizācijas būs izšķirīga nozīme, lai persona varētu pildīt amata pienākumu (Latvijas Brīvo arodbiedrību savienība)" (Darba likums ar komentāriem, 2020, 101. lpp.). Šādas tiesības ir nostiprinātas arī speciālajos normatīvajos aktos (Latvijas Vecticībnieku Pomoras Baznīcas likums, 2007). Tādējādi secināms – ja ārstniecības iestāde ir piesaistīta kādai reliģiskai organizācijai, uz to ar nosacījumu, ka pastāv objektīvi un pamatoti priekšnoteikumi, varētu būt attiecināmi DL nosacījumi, kas pieļauj atšķirīgu attieksmi atkarībā no personas reliģiskās pārliecības. Saistībā ar minēto kā piemēru varētu norādīt EST spriedumā lietā *IR* pret *JQ* nostiprinātās atziņas (Eiropas Savienības Tiesas 2018. gada 11. septembra spriedums lietā *IR* pret *JQ*, Nr. C-68/17).

EST šajā spriedumā atzina – apstāklis, ka Katoļu baznīcai piederoša slimnīca izbeidz darba tiesiskās attiecības ar kādu vadošā amatā esošu katoļticīgu ārstu tāpēc, ka viņš pēc laulības šķiršanas ir stājies otrreizējā laulībā, var būt kvalificējams kā diskriminācija reliģijas dēļ. Proti, prasība, lai vadošā amatā esošs katoļticīgs ārsts respektētu laulības saišu svētumu un nesagraujamību atbilstoši Katoļu baznīcas izpratnei, nešķiet esam būtiska, leģitīma un attaisnota prasība attiecībā uz šo profesiju. Tiesa arīdzan precizēja, ka aizliegums jebkādi diskriminēt reliģijas dēļ ir pēc sava rakstura imperatīvs, jo tas ir vispārējs tiesību princips, kas nostiprināts Pamattiesību hartā, un tādējādi jebkura privātpersona var uz šo aizliegumu atsaukties strīdā, kurā ir piemērojamas ES tiesības

(Eiropas Savienības Tiesa, 2020, 25. lpp.). Līdzīgi EST spriedumā lietā *Egenberger* norādīts, ka prasībai par reliģisko piederību – tālab, lai varētu ieņemt amatu kādā baznīcā vai reliģiskā organizācijā, – ir jāvar būt efektīvi pārbaudāmai valsts tiesu sistēmai piederīgās tiesās. Šai prasībai ir jābūt gan nepieciešamai, gan tādai, kas, ņemot vērā attiecīgās baznīcas vai organizācijas ētosu, objektīvi izriet no attiecīgās profesionālās darbības rakstura vai veikšanas apstākļiem, gan atbilstīgai samērīguma principam (Eiropas Savienības Tiesas 2018. gada 17. aprīļa spriedums lietā *Vera Egenberger* pret *Evangelisches Werk für Diakonie und Entwicklung eV.*, Nr. C-414/16).

Tādējādi jānorāda, ka DL ietvertais atšķirīgas attieksmes atkarībā no personas reliģiskās pārliecības pieļaujamības nosacījums ir attiecināms tikai uz gadījumiem, kad reliģiskajai pārliecībai ir izšķirīga nozīme, lai persona varētu pildīt amata pienākumus – piemēram, ja baznīcai piederošā slimnīcā tiek pieņemts darbā galvenais ārsts, kuram papildus saviem darba pienākumiem ir jābūt atbilstošai izglītībai reliģijas jomā un ir jāpilda arī, piemēram, liturģijas komisijas vadītāja, kurš piedalās reliģiskajās ceremonijās, pienākumi (Darba likums ar komentāriem, 2020, 101. lpp.). Diskriminācija reliģiskās pārliecības dēļ atbilstoši minētajam EST spriedumam šādā situācijā būs identificējama, ja ārstniecības iestāde kā ārsta darba devējs izvirzīs tādas prasības, kas nav saistītas ar ārsta darba pienākumu pildīšanu.

4. Ārstniecības personas tiesības paust savu reliģisko pārliecību darba tiesisko attiecību nodibināšanā

Darba tiesībās, nodarbinātības jautājumos diskriminācijas aizliegumu regulē Darba likums, kura 7. pantā paredzēts, ka "ikvienam darbiniekam ir vienlīdzīgas tiesības uz darbu, taisnīgiem, drošiem un veselībai nekaitīgiem darba apstākļiem, kā arī uz taisnīgu darba apmaksu". Tas nozīmē, ka darba devējam ir jānodrošina šīs tiesības darbiniekiem bez jebkādas tiešas vai netiešās diskriminācijas, tostarp neatkarīgi no darbinieka reliģiskās pārliecības. Diskriminācijas aizliegums pastāv jau sākot ar darba sludinājumu, darba tiesisko attiecību laikā un izbeigšanās gadījumā. Piemēram, ārstniecības personai, kurš pieder vecticībnieku reliģiskajai pārliecībai, ir noteikta zemāka alga nekā ārstniecības personai, kura pieder pie pareizticīgās reliģiskās pārliecības.

DL 33. pantā noteikta darba tiesisko attiecību nodibināšanas procesā realizējamās darba intervijas veikšanas likumiskā kārtība. DL neparedz, ka darba intervija ir obligāts priekšnoteikums, lai personu pieņemtu darbā, taču, pirms darba devējs atsakās no darba intervijas, viņam jāizvērtē faktiskie apstākļi un izvēles nerīkot interviju iespējamās sekas. Tomēr jāņem vērā, ka intervijas rezultātā darba devējam ir iespēja izvēlēties piemērotāko no pretendentiem, turklāt DL aizsargā ne tika darbinieka, bet arī pretendenta tiesības. Saskaņā ar DL 7. pantu ikvienam ir vienlīdzīgas tiesības uz darbu. Tādējādi, ja uz vakanto darba vietu pieteikušies vairāki pretendenti, tad to atlasē nepieciešams ievērot vienlīdzības principu, tas ir, vienādos faktiskajos un tiesiskajos apstākļos izturēšanās jābūt vienādai, savukārt atšķirīgos apstākļos izturēšanās jābūt atšķirīgai (Darba likums ar komentāriem,

2020, 306. lpp.). Piemēram, ja tiek vērtēti pretendenti, kuri pieteicās ķirurga vakantam amatam, tad šajā gadījumā vērtēšanas kritērijiem ir jābūt vienlīdzīgiem neatkarīgi no pretendenta reliģiskās pārliecības.

Ja darba intervija tiek rīkota, tad darba devējam ir saistoši DL 33. panta otrās daļas nosacījumi, kuri paredz, ka darba intervijā nav pieļaujami tādi darba devēja jautājumi, kas neattiecas uz paredzētā darba veikšanu vai nav saistīti ar pretendenta piemērotību šim darbam, kā arī jautājumi, kas ir tieši vai netieši diskriminējoši. Tostarp nav pieļaujami jautājumi, kas skar pretendenta reliģisko pārliecību vai piederību pie kādas reliģiskās konfesijas (Darba likums, 2001, 33. panta otrās daļas 4. punkts).

Jānorāda arī, ka DL 33. panta trešajā daļā noteikts – potenciālajam darba devējam ir pienākums "iepazīstināt pretendentu ar uzņēmumā (ārstniecības iestādē) spēkā esošo darba koplīgumu un darba kārtības noteikumiem, ciktāl tas attiecas uz paredzētā darba veikšanu, kā arī sniegt citu informāciju, kam ir būtiska nozīme darba līguma noslēgšanā." (Darba likums, 2001, 33. panta trešā daļa). Tas nozīmē, ka lietderības nolūkos varētu motivēt labticīgu potenciālo darbinieku darba intervijas laikā savu reliģisko pārliecību atklāti deklarēt, šādi informējot potenciālo darba devēju par kādām specifiskām prasībām un nepieciešamībām reliģisko vajadzību kopšanai.

Ja ārstniecības iestādes darba kārtības noteikumos ir noteikta objektīvi pamatota likumīga mērķa īstenošanai piemērotu un nepieciešamu pasākumu ietvaros realizēta politiskās, filosofiskās, kā arī reliģiskās neitralitātes politika attiecībās ar klientiem–pacientiem vai vispārējs aizliegums nēsāt jebkuras ārējas politiskās, filosofiskās vai reliģiskās pārliecības atšķirības zīmes darbavietā, tieši darba intervijas gaitā ārstniecības persona kā potenciālais darbinieks būtu par šādu faktu informējama (Eiropas Savienības Tiesa. Spriedums *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding* pret *G4S Secure Solutions NV*, Nr. C-157/15, 2017). Tādējādi tiktu panākta optimālu apstākļu izveidošanās leģitīmas savstarpēji izdevīgas vienošanās panākšanai darba līguma noslēgšanas gadījumā. Šādi būtu iespējams vienoties par kādām specifiskām darba organizācijas niansēm (piemēram, strādāšanu vai nestrādāšanu noteiktās dienās, lūgšanu pārtraukumiem) darba vides izkārtojumu, dietāro prasību ievērošanu (ja ārstniecības iestāde kā darba devējs nodrošina darbinieku ēdināšanu) u. c. Gadījumā, ja pretendents uz vakanci pats atklāj DL 33. panta otrās daļas 4. punktā norādīto informāciju, jo īpaši, ja šī informācija var tikt saistīta ar tiešu vai netiešu diskrimināciju, darba devējam jābūt gatavam apliecināt (sniegt pierādījumus, piemēram, liecinieku liecības, protokolus, audio ierakstus), ka DL 33. panta otrās daļas 4. punktā noteiktais nav pārkāpts. Normatīvo aktu prasībām atbilstoši vienošanās rezultāti būtu fiksējami pušu noslēgtajā darba līgumā.

Nav pieļaujams, ka darba tiesisko attiecību nodibināšanā ārstniecības personai tiek noteikts nosacījums atteikties no savas reliģiskās pārliecības, lai tā varētu noslēgt darba līgumu. Tas saistāms ar DL 6. pantu, kurā noteikts, ka nav spēkā darba koplīguma, darba kārtības noteikumu, kā arī darba līguma un darba devēja rīkojumu noteikumi, kas pretēji normatīvajiem aktiem pasliktina darbinieka tiesisko stāvokli (Darba likums, 2001,

6. pants). Kā viens no darījuma absolūtas spēkā neesamības pamatiem ir Civillikuma (turpmāk – CL) 1415. pants, kas noteic, ka neatļauta un nepieklājīga darbība, kuras mērķis ir pretējs reliģijai, likumiem vai labiem tikumiem, vai kura vērsta uz to, lai apietu likumu, nevar būt par tiesiska darījuma priekšmetu; tāds darījums nav spēkā (Latvijas Republikas Augstākās tiesas tiesu prakses apkopojums "Par Civillikuma 1415. panta piemērošanu", 2008, 5. lpp.), Augstākā tiesa ir norādījusi, ka labi tikumi, reliģija, neatļauta un nepieklājīga darbība, atvērtie juridiskie jēdzieni un ģenerālklauzulas ir tie tiesiskie instrumenti, kurus tiesām nākas noskaidrot, interpretēt un piepildīt ar juridisku saturu gadījumos, kad tiek piemērots CL 1415. pants (Latvijas Republikas Augstākās tiesas tiesu prakses apkopojums "Par Civillikuma 1415. panta piemērošanu", 2008, 5.lpp.).

Darījumus nevar atzīt par pretējiem CL 1415. pantam tāpēc vien, ka tie neatbilst kādas reliģijas iekšējai tiesību sistēmai (Balodis, 2007, 230. lpp.). Piemēram, Vecās Derības 2. Mozus grāmatā ir noteikts: "Sešas dienas strādā, bet septītajā dienā atpūties – pat ja tas būtu aršanas un pļaušanas laikā, tev jāatpūšas." (2. Mozus grāmata, 2019, 159. lpp.). Gadījumā, ja izceltos strīds, ka ārstniecības personai darba līgumā ir noteikts, ka tai darba pienākumi jāveic svētdienā, bet ārstniecības persona savas reliģiskās pārliecības dēļ tam nepiekrīt, CL 1415. panta izpratnē nevarētu atzīt, ka šāds darba līgums ir pretējs reliģijai. CL 1415. panta izpratnē par pretēju reliģijai varētu tikt atzīts tāds darba līgums, kurš uzliek par pienākumu ārstniecības personai atteikties no savas reliģiskās pārliecības, izstājoties, piemēram, no Latvijas Evaņģēliski luteriskās baznīcas (Balodis, 2007, 230.–231. lpp.). Minētais saistāms ar iepriekš šajā rakstā analizēto tā saukto "prozelītisma aizliegumu". Proti, valsts nedrīkst noteikt indivīdam, kam viņam būtu jātic, nedrīkst piespiest uzņemties saistības un nedrīkst veikt nekāda veida piespiedu pasākumus, kā arī piemērot sodu, vērst vardarbību vai piedāvāt indivīdam noteikta veida labumus, lai viņš mainītu savu pārliecību, kā arī nedrīkst veikt izmeklēšanu, lai atklātu viņa iekšējo ticību, un piemērot sankcijas, lai mazinātu vai mainītu viņa reliģisko pārliecību (D'Almeida Ribeiro, Amor, Jahangir, Bielefeldt, 2011, p. 2).

5. Ārstniecības personas tiesības paust savu reliģisko pārliecību darba tiesiskajās attiecībās

Attiecībā uz reliģisko pārliecību darba tiesisko attiecību nodibināšanā likumdevējs iekļāva īpašu regulējumu, kas attiecas uz reliģiskajām organizācijām. Izņēmuma gadījumā ir pieļaujams personas reliģisko pārliecību noteikt kā atlases kritēriju (darba sludinājumos, darba intervijā) ar nosacījumu, ka tam ir ir objektīvs un pamatots priekšnoteikums konkrētā darba veikšanai.

Reliģijas paušana sevī ietver ne tikai brīvību gan vienatnē, gan arī kopā ar citiem publiski vai privāti paust savu reliģisko pārliecību vai uzskatus, sludinot tos, piedaloties reliģiskās ceremonijās un rituālos, bet arī reliģisku simbolu izmantošanu, brīvdienu un atpūtas dienu ievērošanu, ēšanas noteikumu ievērošanu, atšķirīga apģērba vai galvassegas valkāšanu, neticības paušanu (Robinson, 2007, p. 73).

Ņemot vērā, ka reliģiskās pārliecības paušana darba tiesiskajās attiecībās nereti var būt tiesiska strīda iemesls, turpmāk uzmanība pievērsta atsevišķiem piemēriem EST un ECT praksē, kā arī nacionālajā līmenī saistībā ar reliģiskā apģērba un simbolu nēsāšanu, reliģiskās darbības veikšanu un atšķirīga darba laika ievērošanu, kas nereti ir strīdus iemesls.

5.1. Reliģiskā apģērba un simbolu nēsāšana

Reliģiskā apģērba un simbolu nēsāšana ir uzskatāma par svarīgu indivīda reliģiskās pārliecības izpausmi. Gadījumos, kad darba devējs lūdz noņemt vai paslēpt, piemēram, reliģisko krustiņu, darbinieks to var uztvert kā darba devēja lūgumu paslēpt viņa reliģisko pārliecību (Hill, Whistler, 2013, p. 27). Darba tiesībās var izcelties tiesisks strīds par to, vai darba devēja aizliegums nēsāt reliģisko apģērbu vai simbolus ir uzskatāms par atšķirīgas attieksmes aizlieguma pārkāpumu.

Piemēram, ECT 2013. gada 15. janvāra spriedumā lietā *Eweida and Others vs. the United Kingdom* ir atklāts, ka ārstniecības iestādei piemīt ļoti plaša rīcības brīvība, nosakot ārstniecības personai reliģiskās pārliecības paušanas ierobežojumus ECPAK 9. pantā ietvertās cilvēka veselības aizsardzības kontekstā, un vienlaikus ir sniegts ieskats konkrēta pacientu drošības aizsardzības kritērija pierādāmībā. Proti, ECPAK 9. pantā noteiktās tiesības uz reliģijas brīvību nebūs pārkāptas, ja darba devējs medicīnas māsai liks noņemt krustiņu vai paslēpt to zem džempera ar augstu apkakli, gadījumā, ja tiks identificēts, ka pastāv risks pacienta vai pašas medicīnas māsas drošībai. Piemēram, pacients krustiņu var satvert un noraut, ievainojot sevi un medicīnas māsu, kā arī pastāv risks, ka ķēdīte ar krustiņu šūpojoties var skart atvērtu brūci. Darba devēja rīcībai, ierobežojot reliģiskās pārliecības paušanu, vienmēr jābūt tiesiskai un konsekventai, un tā nevar būt absolūta, jo ir jāmeklē alternatīvi risinājumi, kā darbiniekam tomēr nodrošināt iespēju īstenot reliģiskās pārliecības brīvību gadījumā, ja ierobežojumi tiek noteikti. Pierādāmās ietekmes uz pacienta veselības apdraudējumu novērtēšanā, izlemjot par reliģiskās pārliecības paušanas ierobežojumu noteikšanu ārstniecības personai, būtiska nozīme ir ne tikai ārstniecības iestādes pienākumam izvērtēt visu iesaistīto pušu intereses, likumību, iecerētā mērķa leģitimitāti un samērīgumu šī mērķa sasniegšanai, bet arī ārstniecības iestādes pienākumam noteikt, vai ārstniecības personai ir iespējams piedāvāt alternatīvus risinājumus reliģiskās pārliecības paušanai (Eiropas Cilvēktiesību tiesas 2013. gada 15. janvāra spriedums lietā *Eweida and Others vs. the United Kingdom*). Proti, šādā kontekstā atzīstams, ka lietās, kas skar reliģiskās pārliecības paušanas ierobežošanu, primāri jāizvērtē visu iesaistīto pušu intereses, likumība un mērķa leģitimitāte, kā arī samērīgums šī mērķa sasniegšanai, lai noskaidrotu, vai nepastāv cilvēktiesību aizskāruma risks (Šāberte, 2017, 109. lpp.).

EST, atsaucoties uz minēto ECT spriedumu lietā *Eweida and Others vs. the United Kingdom*, vairākkārt norādījusi – lai novērstu, ka darbiniekam tiek radītas nelabvēlīgas sekas, nosakot striktas reliģiskās pārliecības īstenošanas robežas, ārstniecības iestādes pienākums ir vērtēt samērīgumu, nosakot, vai ierobežojums ir strikti nepieciešams un

atbilstošs, vai ar to var sasniegt leģitīmu mērķi un vai paredzēto mērķi nevar sasniegt ar citiem līdzekļiem, kā arī vai pastāv alternatīvi risinājumi, kā ārstniecības persona tomēr var īstenot reliģiskās pārliecības brīvību (Eiropas Cilvēktiesību tiesas 2013. gada 15. janvāra spriedums lietā *Eweida and Others vs. the United Kingdom*).

Tāpat EST spriedumā lietā *Samira Achbita* noteikusi, ka darba devējam jāapsver iespēja norīkot darbiniekus darbā ar tādiem klientiem, kuri neiebilst pret redzamām un uzkrītošām reliģiskās pārliecības atšķirības zīmēm. Būtiska ir samērīguma principa ievērošana uzņēmuma neitralitātes politikas ieviešanā attiecībā uz visiem darbiniekiem. Nosakot reliģiskās pārliecības paušanas ierobežojumus līdz strikti nepieciešamajam līmenim, jāņem vērā, cik liela un uzkrītoša ir katra konkrētā darbinieka reliģiskās atšķirības zīme, kā arī darbinieka pienākumu būtība, konteksts, kurā darbiniekam jāizpilda šie pienākumi, kā arī attiecīgās dalībvalsts nacionālā identitāte. Eiropas Savienības Padomes 2000. gada 27. novembra Direktīvā 2000/78/EK, ar ko nosaka kopēju sistēmu vienlīdzīgai attieksmei pret nodarbinātību un profesiju, noteikts, ka aizliegums nēsāt reliģiskās pārliecības atšķirības zīmes darbavietā nav tieša diskriminācija reliģijas vai uzskatu dēļ, ja aizliegums tiek noteikts visiem uzņēmuma darbiniekiem (Eiropas Savienības Tiesas 2016. gada 31. maija spriedums lietā *Samira Achbita* un *Centrum voor gelijkheid van kansen en voor racismebestrijding* pret *G4S Secure Solutions NV* (*Hof van Cassatie*)). Tādējādi netiek pārkāpta vienlīdzīguma principa ievērošana darba tiesiskajās attiecībās.

5.2. Reliģiskās darbības veikšana

Latvijā par reliģiskās darbības veikšanu saskaņā ar Reliģisko organizāciju likumu uzskatāma nodošanās reliģijai vai ticībai, piekopjot kultu, izpildot reliģiskas vai rituālas ceremonijas un sludinot mācību un kas var tikt veikta aktīvas reliģijas paušanas formā, izmantojot rituāla priekšmetus (Reliģisko organizāciju likums, 1995, 1. panta 1. punkts). Piemēram, slimnīcās reliģisko darbību saskaņā ar Reliģisko organizāciju likumu var veikt, ja to vēlas tajās esošās personas un paredzētā pasākuma laiks un vieta ir saskaņota ar slimnīcas administrāciju (Reliģisko organizāciju likums, 1995, 14. panta piektā daļa). Tātad, ja ārstniecības persona ar slimnīcu kā savu darba devēju ir vienojusies par kādām specifiskām darba organizācijas niansēm, piemēram, lūgšanu pārtraukumiem slimnīcas kapelā, tad šāda vienošanās būs uzskatāma par saskaņojumu ar slimnīcas administrāciju Reliģisko organizāciju likuma izpratnē.

Saskaņā ar Reliģisko organizāciju likumu reliģiskā darbība ir ierobežojama, ja tiek pārkāpta Latvijas Republikas Satversme un likumi (Reliģisko organizāciju likums, 1995). Tādējādi saskaņā ar Reliģisko organizāciju likumu pārkāpumam pēc būtības jābūt jau identificējamam, lai reliģisko darbību varētu ierobežot (Šāberte, 2018, 25. lpp.). Šāds Reliģisko organizāciju likuma 14. panta sestās daļas formulējums reliģiskās darbības ierobežošanas kontekstā attiecībā uz ārstniecības iestādēm varētu būt problemātisks, jo, kā norādīts iepriekš, ārstniecības iestādei kā institūcijai, no vienas puses, ir pienākums nodrošināt ārstniecību un pacienta tiesības, bet kā ārstniecības personas darba devējam, no otras puses, ir pienākums rūpēties, lai gan ārstniecības personas, gan pacienta

tiesības varētu tikt sabalansēti īstenotas. Autores pauž nostāju, ka ārstniecības iestādēm pacientu tiesību aizsardzības nolūkos ir pienākums izvērtēt visus iespējamos riskus jau iepriekš, pirms sniegt atļauju veikt reliģisko darbību. It īpaši veselības aprūpē, lai mazinātu cilvēktiesību aizskāruma risku, ir rūpīgi jāievēro visi cilvēktiesību instrumentos noteiktie kritēriji reliģiskās pārliecības paušanas ierobežošanai, tostarp, vai izraudzītie līdzekļi ir piemēroti leģitīmā mērķa sasniegšanai, vai šāda rīcība ir nepieciešama, vai leģitīmo mērķi nevar sasniegt ar indivīda tiesības mazāk ierobežojošiem līdzekļiem un vai ierobežojums ir atbilstošs (Šāberte, 2018, 22.–26. lpp.).

Jāņem vērā, ka darba tiesisko attiecību kontekstā ārstniecības persona reliģisko pārliecību var paust, ne tikai veicot aktīvu reliģisko darbību un nēsājot reliģisko apģērbu vai simbolus, bet arī izsakoties pret kādas citas personas reliģisko pārliecību. Piemēram, autores vēlētos vērst uzmanību uz piemēru, kurā ārstniecības personas pauda savu attieksmi pret reliģiskās darbības veikšanu un kas raisīja diskusijas sabiedrībā un masu medijos. Proti, VSIA "Paula Stradiņa klīniskā universitātes slimnīca" Intensīvās terapijas un reanimācijas nodaļas dežūrārsts apgalvoja, ka viņš slimnīcā ir Dievs, un pie pacienta, kuram bija dots saskaņojums veikt reliģisko darbību, neielaida pacienta tuvinieku pieaicinātu garīdznieku reliģiska rituāla veikšanai, kā rezultātā tas notika caur logu (Šāberte, 2018, 26. lpp.). Kaut gan saskaņā ar tiesībām uz reliģijas brīvību jebkurai personai ir tiesības brīvi izvēlēties, kam ticēt vai neticēt un bez jebkādiem ierobežojumiem mainīt reliģiju un ticību vai atteikties no tās, šāda ārstniecības personas reakcija nav pieļaujama no normatīvo aktu viedokļa, kas skar ārsta profesionālo ētiku un attieksmes un saskarsmes jautājumus ar pacientu. Ētikas normas ārstam uzliek augstus komunikācijas standartus, paredzot, ka ārstniecības personas uzvedībai jābūt nevainojamai, lai izpelnītos cieņu, kādai jābūt sabiedrībā pret visiem šīs profesijas pārstāvjiem, turklāt arī attiecībā pret pacientu ir jāizturas ar laipnu attieksmi neatkarīgi no viņa slimības rakstura un smaguma. Analizējot šo gadījumu no darba tiesību aspekta, secināms, ka šajā gadījumā būtu konstatējams ārstniecības personas pārkāpums, kā rezultātā darba devējam būtu tiesības izteikt viņam rājienu vai piezīmi. Gadījumā, ja ārstniecības personas rīcība būtu kvalificēta kā būtisks darba kārtības vai darba līguma noteikumu pārkāpums, kurš izpaudās kā pacientu tiesību neievērošana, pārkāpjot pacienta tiesības uz reliģisko pārliecību, neielaižot pacienta tuvinieku pieaicināto garīdznieku reliģiska rituāla veikšanai, būtu piemērojams DL 101. panta pirmās daļas 1. punkts.

5.3. Atšķirīga darba laika ievērošana

Latvijā atšķirīga darba laika ievērošanas tiesiskie aspekti reliģiskās pārliecības dēļ ir reglamentēti DL. Tā, piemēram, pastāvot situācijai, ja darba nedēļas ietvaros viena darba diena iekrīt starp svētku dienu un nedēļas atpūtas laiku, darba devējs šo darba dienu var noteikt par brīvdienu un pārcelt to uz sestdienu tajā pašā nedēļā vai citā nedēļā tā paša mēneša ietvaros. Ja darbinieks savas reliģiskās pārliecības vai citu pamatotu iemeslu dēļ nevar ierasties darbā pārceltajā darba dienā, šī diena tiek uzskatīta par darbinieka ikgadējā atvaļinājuma dienu vai, vienojoties ar darba devēju, tā tiek atstrādāta citā laikā

(Darba likums, 2001, 133. panta ceturtā un piektā daļa). Tāda situācija var pastāvēt gadījumā, ja ārstniecības persona savas reliģiskās pārliecības dēļ nevar veikt darbu sestdienā. Ja puses nevar vienoties par to, ka šī diena uzskatāma par ikgadējā atvaļinājuma dienu, un nav iespējams panākt vienošanos par pārceltās dienas atstrādāšanu, tad darbiniekam šī diena ir uzskatāma par ikgadējā apmaksātā atvaļinājuma dienu. Šādā situācijā tieši ārstniecības personas kā darbinieka pienākums būs pierādīt, ka viņš atbilst DL 133. panta piektās daļas noteiktajiem kritērijiem, piemēram, iesniedzot darba devējam izziņu par piederību baznīcai (Latvijas Brīvo arodbiedrību savienība, 2020).

Tiesisks strīds saistībā ar atšķirīga darba laika ievērošanu minēts EST spriedumā lietā *Cresco Investigation GmbH*, kurā tiesai tika lūgts sniegt prejudiciālu nolēmumu par to, kā interpretēt atšķirīgu attieksmi reglamentējošās tiesību normas, kas nostiprinātas Pamattiesību hartā un Eiropas Savienības Padomes 2000. gada 27. novembra Direktīvā 2000/78/EK, ar ko nosaka kopēju sistēmu vienlīdzīgai attieksmei pret nodarbinātību un profesiju saistībā ar tiesībām saņemt papildu piemaksu pie saņemtās darba samaksas par darbu, kas veikts Lielajā piektdienā (Eiropas Savienības Tiesas 2019. gada 22. janvāra spriedums lietā *Cresco Investigation GmbH* pret *Markus Achatzi*, Nr. C-193/17). Lietā analizētajos nacionālajos (Austrijas) tiesību aktos norādīts, ka darba ņēmējam svētku dienās ir tiesības uz vismaz 24 stundu ilgu nepārtrauktu atpūtas laikposmu, kuram ir jāsākas svētku dienā, agrākais plkst. 00.00 un vēlākais plkst. 6.00. Austrijā par svētku dienām tiek uzskatītas: 1. janvāris (Jaungada diena), 6. janvāris (Epifānija jeb Zvaigznes diena), Otrās Lieldienas, 1. maijs (Valsts svētku diena), Debesbraukšanas diena, Otrie Vasarsvētki, Vissvētākās Jēzus Sirds svētki, 15. augusts (Jaunavas Marijas debesīs uzņemšanas diena), 26. oktobris (Nacionālo svētku diena), 1. novembris (Visu svēto diena), 8. decembris (Bezvainīgās ieņemšanas diena), 25. decembris (Pirmie Ziemassvētki) un 26. decembris (Otrie Ziemassvētki). Evaņģēliski luterisko Augsburgas ticības apliecības baznīcas un Reformātu baznīcas, Veckatoļu baznīcas un Evaņģēliskās metodistu baznīcas draudžu locekļiem arī Lielā piektdiena ir svētku diena. Analizētajos nacionālajos tiesību aktos paredzēts, ka darba ņēmējs saglabā savas tiesības uz darba samaksu, ja svētku diena sakrīt ar darba dienu. Darba ņēmējam pienākas darba samaksa, ko viņš būtu saņēmis par darbu, kas būtu bijis jāveic, ja nebūtu radušies apstākļi, ka darbs jāveic svētku dienās. Darba ņēmējam, kuru nodarbina svētku dienā, līdztekus darba samaksai ir tiesības uz atlīdzību, kas pienākas par veikto darbu, ja vien nav panākta vienošanās par kompensējošu atpūtas laiku (Eiropas Savienības Tiesas 2019. gada 22. janvāra spriedums lietā *Cresco Investigation GmbH* pret *Markus Achatzi*, Nr. C-193/17).

Aplūkotajā gadījumā pastāvēja tiesisks strīds par to, ka darbinieks nebija ne Augsburgas ticības apliecības evaņģēliski luteriskās baznīcas un Reformātu baznīcas, ne Veckatoļu baznīcas un Evaņģēliskās metodistu baznīcas draudzes loceklis un uzskatīja, ka ir ticis diskriminēts, jo viņam ir tikusi liegta piemaksa par darbu svētku dienā, ko viņš bija veicis 2015. gada 3. aprīlī, Lielajā piektdienā, un tādējādi pieprasīja atlīdzību, kas viņam par šo dienu pienāktos līdztekus darba samaksai (Eiropas Savienības Tiesas 2019. gada 22. janvāra spriedums lietā *Cresco Investigation GmbH* pret *Markus Achatzi*, Nr. C-193/17).

EST, izskatot šo lietu, atzina, ka Eiropas Savienības Padomes 2000. gada 27. novembra Direktīvas 2000/78/EK, ar ko nosaka kopēju sistēmu vienlīdzīgai attieksmei pret nodarbinātību un profesiju izpratnē ar valsts tiesisko regulējumu, saskaņā ar kuru, pirmkārt, Lielā piektdiena ir svētku diena tikai darba ņēmējiem, kas ir noteiktu kristīgās baznīcas draudžu locekļi, un, otrkārt, vienīgi šiem darba ņēmējiem, ja viņiem ir jāstrādā šajā svētku dienā, ir tiesības uz papildu piemaksu pie saņemtās darba samaksas par šajā dienā veikto darbu, ir radīta tieša diskriminācija reliģijas dēļ. Valsts tiesiskajā regulējumā paredzētie pasākumi nevar tikt uzskatīti ne par pasākumiem, kas ir vajadzīgi citu personu tiesību un brīvību aizsardzībai, ne arī par īpašiem pasākumiem, kuru mērķis ir kompensēt trūkumus, kas saistīti ar reliģiju. Saskaņā ar Pamattiesību hartu tikmēr, kamēr attiecīgā dalībvalsts, lai atjaunotu vienlīdzīgu attieksmi, nav grozījusi savu tiesisko regulējumu, ar kuru tiesības uz svētku dienu Lielajā piektdienā ir piešķirtas tikai darba ņēmējiem, kas ir noteiktu kristīgās baznīcas draudžu locekļi, privātajam darba devējam, uz kuru attiecas šis tiesiskais regulējums, ir pienākums tiesības uz svētku dienu Lielajā piektdienā piešķirt arī saviem pārējiem darbiniekiem ar nosacījumu, ka pēdējie minētie ir šim darba devējam iepriekš lūguši atbrīvot viņus no pienākuma strādāt šajā dienā, tātad atzīt šo darba ņēmēju tiesības uz papildu piemaksu pie saņemtās darba samaksas par šajā dienā veikto darbu, ja minētais darba devējs ir atteicies šādu lūgumu apmierināt (Eiropas Savienības Tiesas 2019. gada 22. janvāra spriedums lietā *Cresco Investigation GmbH* pret *Markus Achatzi*, Nr. C-193/17).

6. Ārstniecības personas darba tiesisko attiecību izbeigšanās tiesiskie izaicinājumi saistībā ar ārstniecības personas reliģiskās pārliecības paušanu

Jānorāda, ka iepriekšminētie tiesiskie izaicinājumi galvenokārt saistīti ar nepieciešamību veikt objektīvu izvērtējumu, vai personas reliģiskās pārliecības paušanas gadījuma izraisītā problēmsituācija satur pietiekošu kvantitatīvo un kvalitatīvo pazīmju kopumu likumīgai un pamatotai darba tiesisko attiecību izbeigšanai.

Gadījumos, kad ārstniecības personas reliģijas paušanas dēļ ir ticis būtiski pārkāpts noslēgtais darba līgums, darba devējam ir tiesības uzteikt darba līgumu, pamatojoties uz DL 101. panta pirmās daļas 1. punkta nosacījumiem (Darba likums, 2001, 101. panta pirmā daļa). Šeit gan jānorāda, ka minētajā situācijā darba devējam ir saistošs izdarītā pārkāpuma īpašās nozīmības – "būtiskuma" – pierādīšanas pienākums.

DL 101. panta pirmās daļas 1. punktā norādīts, ka darbinieks bez attaisnojoša iemesla būtiski pārkāpis darba līgumu vai noteikto darba kārtību. Jēdziens "būtiski" ir ģenerālklauzula, kuras aizpildīšana ar saturu ir atstāta tiesību piemērotāju ziņā. No minētā secināms, ka vispirms, protams, darba devējam ir jāizvērtē, vai pārkāpums ir būtisks, taču, skatot strīdu tiesā, neapšaubāmi, tiesas pienākums ir pārbaudīt, vai darba devējs pareizi šo jēdzienu piemērojis konstatētajiem apstākļiem (Latvijas Republikas Augstākās tiesas spriedums lietā Nr. SKC-299/2011, 2011).

Lai izbeigtu darba tiesiskās attiecības, pēc DL 101. panta pirmās daļas 1. punkta darba devējam ir nepieciešams, pirmkārt, konstatēt pārkāpumu, otrkārt, pieprasīt no darbinieka paskaidrojumus par konstatēto pārkāpumu, treškārt, izvērtēt "būtiskumu". DL neparedz kārtību, kādā veidā tiek izvērtēts "būtisks" pārkāpums; šajā gadījumā darba devējam ir rīcības brīvība. Praksē bieži vien tiek izveidotas komisijas, piemēram, ētikas komisija, disciplinārlietas komisija vai vienkārši komisija konkrētajam gadījumam.

Darba devēja kompetencē ir izvērtēt pārkāpuma smagumu, apstākļus, piemēram, pārkāpums attiecībā uz pacientu reliģijas paušanas neievērošanu būtu vērtējams kā smags vai viegls. Darba devējam, vērtējot pārkāpuma smagumu un apstākļus, nepārprotami ir jāņem vērā darbinieka personiskās īpašības un līdzšinējais darbs. Šajā tiesību normā norādīts, ka galvenais ir pierādīt "būtiskumu". Piemēram, ārstniecības persona neieradās sestdienā uz dežūru, jo pēc savas reliģiskās pārliecības ir piederīga Septītās Dienas Adventistu draudzei, kuras baznīcas mācībā ir noteikts ierobežojums veikt darbu sestdienā, un bija nepieciešams piedalīties draudzes pasākumā, tāpēc ārstniecības persona neveica operāciju, tādējādi radot kaitējumu pacientam. Jāvērš uzmanību, ka darba devējam būs jāpierāda "būtiskums". Praksē bieži vien uzņēmumu darba kārtības noteikumos ir definēts, kas ir "būtisks pārkāpums", un minēts sods pēc to smaguma gradācijas. Piemēram, par vidēji smagu pārkāpumu tiek piemērots kāds no disciplinārsodiem – rājiens vai piezīme. Arī ārstniecības iestādes šādu praksi var izmantot, tādējādi laicīgi sniegt "būtiskuma" definīciju iestādē un noteikt pārkāpuma smaguma pakāpi, ja tiek pārkāptas reliģiskās pārliecības paušanas tiesības. Jāuzsver, ka darba tiesisko attiecību izbeigšanās nav dicsiplinārsods DL tvērumā. Darba tiesiskās attiecības ir izbeidzamas, ja darbineiks vairākkārtīgi pārkāpis iestādes darba kārtības noteikumus vai noslēgto darba līgumu, un šajā gadījumā "būtiskums" tiktu piepildīts ar saturu, jo darbinieks neņēma vērā iepriekš piemērotos disciplinārsodus, iepriekš izdarīto pārkāpuma smagumu un sekas, kā arī viena gada laikā vairākkārtīgi ir pārkāpis darba kārtības noteikumus vai noslēgto darba līgumu.

Aplūkojot jautājumu par ārstniecības personas darba tiesisko attiecību izbeigšanos, kā vienu no tiesiskajiem izaicinājumiem varētu minēt ārstniecības personas atteikšanos no vakcinācijas reliģiskās pārliecības dēļ, kas varētu būt aktuāls arī Covid-19 izplatības laikā. Šajā sakarā darba devēja rīcība cilvēka pamattiesību samērīguma kontekstā varētu būt saistīta ar alternatīvo, pamattiesības mazāk ierobežojošo vai vispār neierobežojošo līdzekļu izvēli, piemēram, ārstniecības personas pagaidu norīkošanu darbā ārstniecības iestādes administratīvo pienākumu pildīšanai attālināti, kas nav saistīts ar risku citu cilvēku, tostarp pacientu, veselībai (Tieslietu ministrija, 2021, 7. lpp.). Tā kā epidemioloģiskās drošības nolūkos ārstniecības personas norīkošana darbā citviet varētu būt vienīgais alternatīvais un saudzējošākais līdzeklis, lai neierobežotu ārstniecības personas cilvēktiesības, saistoša ir DL 98. panta pirmā daļa, kurā noteikts, ka darba devējam saskaņā ar DL 101. panta pirmās daļas noteikumiem ir tiesības ne vēlāk kā vienu mēnesi iepriekš rakstveidā uzteikt darba līgumu ar nosacījumu, ka darba tiesiskās attiecības tiks izbeigtas, ja darbinieks nepiekritīs tās turpināt atbilstoši darba devēja piedāvātajiem darba līguma

grozījumiem (Darba likums, 2001, 98. panta pirmā daļa). Šajā sakarā autores vērš uzmanību uz to, ka gadījumā, ja ārstniecības persona nepiekristu darba devēja piedāvātajiem darba līguma grozījumiem, darba līguma uzteikšana atbilstoši DL 101. pantam varētu būt problemātiska. Proti, DL 101. pantā nav ietverts neviens kritērijs, kas paredz, ka darba devējs varētu uzteikt darba līgumu gadījumā, ja darbinieks nepiekrīt pamatotam darba devēja rīkojumam uz noteiktu laiku pildīt citus darba pienākumus vai tiek norīkots pildīt darba pienākumus citā vietā, piemēram, attālināti, bet tam nepiekrīt. Līdz ar to autores pauž viedokli, ka lietderības nolūkos DL 101. pirmā daļa būtu jāpapildina ar 12. punktu, izsakot to šādā redakcijā:

"12) darbinieks nepiekrīt darba devēja pamatotam rīkojumam uz noteiktu laiku pildīt citus darba pienākumus vai pildīt darba pienākumus citā darba vietā, tostarp attālināti."

Atbilstoši minētajam būtu grozāmi arī DL 110. panta pirmās daļas pirmajā teikumā ietvertie nosacījumi, izsakot DL 110. panta pirmo daļu šādā redakcijā:

"(1) Darba devējam aizliegts uzteikt darba līgumu darbiniekam – arodbiedrības biedram – bez attiecīgās arodbiedrības iepriekšējas piekrišanas, ja darbinieks ir arodbiedrības biedrs vairāk nekā sešus mēnešus, izņemot gadījumus, kas noteikti šā likuma 47. panta pirmajā daļā un 101. panta pirmās daļas 4., 8., 10. un 12. punktā. Ja darba līgumu paredzēts uzteikt šā likuma 101. panta pirmās daļas 7. un 11. punktā minētajā gadījumā, darba devējs iepriekš informē arodbiedrību un konsultējas ar to."

Tādējādi, pēc autoru domām, tiktu nodrošinātas darba devēja likumīgās tiesības panākt ekonomiski pamatotu un taisnīgu ar ārstniecības personas reliģiskās pārliecības paušanu saistītas potenciālas darba tiesisko attiecību izbeigšanos.

Nobeigums

Jautājums par ārstniecības personu tiesībām paust savu reliģisko pārliecību darba tiesiskajās attiecībās ir komplicēts un balstīts uz tiesiskā rakstura izaicinājumiem, ne tikai no cilvēktiesību aspekta raugoties, bet arī ņemot vērā darba tiesiskās attiecības regulējošos tiesību aktus. Nav apstrīdams, ka demokrātiskā sabiedrībā, kur vienlaikus var pastāvēt vairākas reliģijas, ir nepieciešams nodrošināt šo reliģiju līdzāspastāvēšanu, līdz ar to dalībvalstīm, kuras pievienojušās minētajiem cilvēktiesību instrumentiem, tiesību uz reliģijas brīvību jomā ir uzlikta virkne pienākumu. Dalībvalstīm ir jābūt neitrālām, sniedzot iespēju katram indivīdam, tostarp arī ārstniecības personām, pieņemt vai nepieņemt reliģiju atbilstoši viņa pārliecībai. Tas nozīmē, ka ārstniecības personai tiesības uz reliģijas brīvību, tostarp uz reliģijas paušanu, piemīt neatkarīgi no ārstniecības personas profesijas, kurā tā veic ārstniecību. Vērtējot līdzsvaru starp ārstniecības personas pamattiesību ierobežojumu un labumu, ko gūst pacients noteiktā ierobežojuma gadījumā, ir jāizskata arī diskriminācijas aizlieguma principu ievērošana. Tas pamatojams ar apstākli, ka darba tiesību jomā var pastāvēt tiesiski strīdi par to, vai darba devējs (konkrētajā gadījumā ārstniecības iestāde) attiecībā pret darbinieku (konkrētajā gadījumā

ārstniecības persona) potenciāli nav pieļāvis diskriminācijas aizlieguma pārkāpumus atkarībā no viņa reliģiskās pārliecības.

Jāatzīmē arī tas, ka ārstniecības iestādei ir būtiska loma iepriekšminēto tiesību aizsardzībā gan kā institūcijai, kurai ir pienākums nodrošināt ārstniecību un pacienta tiesības, gan arī kā ārstniecības personas darba devējam, kurai ir pienākums rūpēties, lai ārstniecības personas un pacienta tiesības varētu tikt sabalansēti īstenotas. Ārstniecības iestādei, ierobežojot reliģiskās pārliecības paušanu, vienmēr jāpārbauda, vai iecerētais mērķis var tikt sasniegts ar mazāk ierobežojošiem līdzekļiem nekā formālu aizliegumu, un tādējādi jātiecas nodrošināt reliģiskās pārliecības paušanas īstenošanu tiktāl, ciktāl tas vien iespējams.

Nav pieļaujama ārstniecības personas reliģiskās pārliecības paušanas formāla ierobežošana bez tiesiski attaisnojama nolūka, jo tā var būt par pamatu atšķirīgas attieksmes aizlieguma pārkāpumiem. Gadījumos, kad ārstniecības personas reliģijas paušanas dēļ ir ticis būtiski pārkāpts noslēgtais darba līgums, darba devējam ir tiesības uzteikt darba līgumu, pamatojoties uz DL 101. panta pirmās daļas 1. punkta nosacījumiem. Šeit gan jānorāda, ka minētajā situācijā darba devējam ir saistošs izdarītā pārkāpuma īpašās nozīmības – "būtiskuma" – pierādīšanas pienākums.

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Piespiedu ārstēšana kā valsts pārvaldes uzdevums jeb kas ir kopīgs tifozajai Mērijai un Trakajam Ludvigam

Compulsory Treatment as Task of Public Governance or What Thyphoid Mary and Mad King Ludwig Had in Common

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Abstract

The article concerns involuntary treatment of infectious and mental diseases. Development of the legal regulation since the 19th century has been described here. Quality of the existing legal regulation has also been evaluated. Issues of involuntary psychiatric treatment have been analysed and demonstrated by the international case-law and state court practice. Significant differences between legislation in mental and infectious diseases has been detected, as well as differences have been traced between legal standards in the area of involuntary placement and involuntary treatment of mental disorders in Latvia and other countries. It has been concluded that involuntary psychiatric treatment, in line with epidemiological safety, is a task of public governance in the area of domestic security and safeguarding of human rights and it has to be reinforced by governmental authority. Thus, proposal of elaboration of the corresponding law has been made.

Keywords: compulsory measure of medical nature, human rights, infectious diseases, involuntary treatment, mental diseases, state coercive power.

Ievads

"Tiesiska valsts tikai tad pilnībā izpilda savu tiesību aizsardzības uzdevumu, ja novērš draudošus likuma pārkāpumus, cik vien tas faktiski un juridiski iespējams."

Roberts Mols (*Robert von Mohl*, 1799–1875)

Demokrātiskā valstī personas tiesību ierobežošana ir pieļaujama tikai sociāli derīgo mērķu sasniegšanai un notiek saskaņā ar likumu.

Piespiedu medicīniskām intervences psihisko un uzvedības traucējumu un infekciju slimību gadījumos ir vienots mērķis – valsts iekšējās drošības un cilvēktiesību aizsardzības garantija.

Atbilstošām tiesību normām ir jābūt kvalitatīvām, efektīvām, dzīves objektīvajām prasībām un sabiedrības attīstības interesēm atbilstošām, jāgarantē līdzsvars starp sabiedrības interesēm un cilvēktiesību ievērošanu.

Balstoties uz vēsturiskām un modernām zināšanām par piespiedu medicīnisko intervenču nozīmi, analizējot personas tiesību un brīvību ierobežojumus to laikā, Eiropas Cilvēktiesību tiesas spriedumus, kā arī vērtējot konkrētā tiesiskā regulējuma attīstību, raksta autori konstatējuši, ka Latvijā psihiatriskās piespiedu ārstēšanas tiesiskais regulējums būtiski atšķirības no piespiedu infekciju slimību ārstēšanas regulējuma, kā arī no citu valstu prakses.

Secināts, ka ir nepieciešams izpētīt psihiatriskās palīdzības bez personas piekrišanas un medicīniska rakstura piespiedu līdzekļu tiesiskā regulējuma problemātiku Latvijā, apzināt citu valstu pieredzi un ieteikt problēmas risinājumu, izveidojot uz cilvēktiesībām balstītu šīs jomas tiesisku regulējumu.

Publikācijas sagatavošanā izmantots šāds materiāls un metodes – normatīvo aktu, tiesu prakses un zinātniskās literatūras analīze un apraksts, pielietota dogmatiskā, analītiskā, salīdzinošā pētniecības metode, kā arī gramatiskā, sistēmiskā, vēsturiskā un teleoloģiskā tiesību normu interpretācijas metode.

Kas bija tifozā Mērija un Trakais Ludvigs

Mērija Malūna (*Mary Mallon,* 1869–1938) jeb "tifozā Mērija" bija vēdertīfa baktēriju nēsātāja – veselīga izskata meitene, imigrante no Īrijas, kas, juzdamās vesela, strādāja par virēju Ņujorkas ģimenēs un izraisīja lokālas vēdertīfa epidēmijas ar fatālām sekām. Viņa neatzina savas veselības problēmas – uz piedāvājumu nodot fēču un urīna analīzes reaģēja, uzbrūkot epidēmijas iemeslu izmeklētājam ar servēšanas dakšu; kad policijas inspektori viņu nogādāja slimnīcā, mēģināja bēgt; kategoriski atteicās no ārstēšanas (žultspūšļa, kur persistēja baktērijas, izņemšanas ķirurģiskā ceļā), tāpēc tika izolēta karantīnā. 1909. gadā Ņujorkas štata Augstākajā tiesā, kur tika skatīta viņas lieta, raisījās asas debates par personas autonomijas un valsts atbildību sabiedrības veselības krīzes laikā. Pretēji tiesas lēmumam pēc karantīnā pavadītiem trīs gadiem viņa tika

atbrīvota – ar nosacījumu, ka mainīs nodarbošanos. Mērija ierobežojumus neievēroja, nesaprata roku mazgāšanas nepieciešamību, turpināja strādāt un izplatīt vēdertīfu, kas rezultējās ar viņas atkārtotu izolāciju – šoreiz jau līdz mūža beigām (Marineli, Tsoucalas, 2013; Strochlic, 2020).

Ludvigs II (*Ludwig Otto Friedrich Wilhelm*, 1845–1886), ko dēvē arī par Trako karali Ludvigu, par Bavārijas valdnieku kļuva 19 gadu vecumā. Jaunais monarhs izcēlās ar ārējām dotībām, inteliģenci, asu prātu, kā arī rakstura un interešu dīvainībām un īpatnēju acu spožumu, kurā slavenais franču psihiatrs Morēls (*Bénédict Augustin Morel,* 1809–1873) saskatīja trakuma atspulgu. Viņa slimība pakāpeniski progresēja, un vairāku gadu laikā, realizējot savas trakās idejas, monarhs izputināja kroņa kasi un paralizēja valsts pārvaldi. Ludvigs II – sieviešu nīdējs, Riharda Vāgnera (*Wilhelm Richard Wagner*) un Leopolda fon Zahera-Mazoha (*Leopold Ritter von Sacher-Masoch*) daiļrades cienītājs – piekopa noslēgtu dzīvesveidu, nodevās savām kaislībām – mūzikai un arhitektūrai (vēsturē viņš iegājis kā Neišvānšteinas pils būvnieks; šī pils savulaik kļuva par Volta Disneja Pelnrušķītes pils prototipu). Izvairoties no sabiedrības, karalis atteicās pieņemt ministrus un sūtņus, savukārt daudzas pavēles paziņoja caur aizslēgtām durvīm. Monarhs mocījās ar bezmiegu, galvassāpēm, ievērojami pieņēmās svarā; viņš dzirdēja balsis un redzēja halucinācijas, dusmu lēkmju laikā cietsirdīgi izrīkojās ar padotajiem. Kad kārtējam arhitektūras brīnumam pietrūka naudas, karalis pavēlēja no pils apkalpes izveidot bandas un laupīt Vīnes, Berlīnes un Štutgartes bankas.

1886. gadā bija izveidota speciāla komisija karaļa psihiskā stāvokļa noteikšanai. Tajā piedalījās arī slavenais psihiatrijas profesors Bernhards Gudēns (*Johann Bernhard Aloys von Gudden*, 1824–1886), kurš ilgus gadus veica Bavārijas karaļa dzimtas psihiatrisko aprūpi. 1886. gada 9. jūnijā komisija sagatavoja slēdzienu: Viņa augstība ir smagi un nedziedināmi psihiski slims, slimības iznākums būs plānprātība; tāda slimība laupa gribas brīvību, un karalis turpmāk tikai traucēs pārvaldīt karaļvalsti.

Uzzinot izpētes rezultātus, valdnieks ļoti pārdzīvoja troņa zaudēšanu, bet visvairāk to, ka viņu grib padarīt par traku, tāpēc izteicās par gatavību labāk veikt pašnāvību, nekā ciest tādu pazemojumu. Nonācis sava aresta vietā – Bergas pilī –, karalis savaldījās, laipni un mierīgi sarunājās. 13. jūnija vakarā viņš kopā ar profesoru Gudēnu devās pastaigā uz Štarnbergas ezeru, bet pirms tam aizsūtīja prom kalpus. Drīzumā ezerā tika atrasti abu līķi ar cīņas pazīmēm – visdrīzāk, dūšīgais 42 gadus vecais karalis uz sēkļa noslīcinājis 62 gadus veco psihiatru un pats noslīcinājies, ieejot ezera dziļumā (Kovalevskiy, 2017; Müller, 2002; Bhattacharyya, 2017).

Atbildot uz virsrakstā izvirzīto jautājumu, jāsecina, ka abas personas – tifozā Mērija un Trakais Ludvigs – bija apkārtējiem bīstamas veselības traucējumu dēļ, taču sevi neuzskatīja par slimām, un tas radīja smagas sekas – Mērija inficēja ar fatālu slimību vairākus desmitus cilvēku, savukārt Ludvigs II paralizēja Bavārijas pārvaldes darbu un, iespējams, nogalināja savu psihiatru. Mūsdienās to, ka psihiski un infekciozi slimnieki ir līdzīgi sabiedriski bīstami, atzīst arī tiesa, skatot slaveno lietu *Tarasoff v. Regents of*

the University of California un izvērtējot psihoterapeita pienākumu novērst homicīdu (cilvēka vai cilvēku nogalināšanu), ko izplānoja un vēlāk arī īstenoja viņa pacients (Rotter, Cucolo, 2019).

Abi minētie piemēri skaidri parāda ne vien to, cik svarīga ir psihiatrija kā darba medicīnas sastāvdaļa, bet arī to, ka medicīnas darbinieku "rokas ir par īsu", lai garantētu sabiedrības (un arī savu) drošību dažos gadījumos, un tad varas iestāžu iesaiste ir obligāta. Pat pieredzējis psihiatrs, kas ilgstoši pazinis pacientu, nespēja paredzēt un novērst viņa agresiju un autoagresiju.

Sabiedriski kaitīgi nodarījumi, ko veic psihiski slimās personas, ir viena no psihiatrijas un sabiedriskās veselības svarīgākajām problēmām. Šo nodarījumu raksturs atšķiras no tiem nodarījumiem, ko veic personas bez psihiskām saslimšanām vai būtiskām novirzēm, un vienmēr raisa pārdomas, vai bija iespējama to prevencija. Nodarījumi tiek veikti pilnīgi neparedzami, nepadodas loģikai, bet gan vienīgi psihotiska stāvokļa neprognozējamai dinamikai, un ikviens var saskarties ar to sekām (Voronkova, Apletayev, 2017).

Ja pret infekcijas slimībām mums ir pieejamas vakcīnas un citi individuālās profilakses pasākumi, tad pret psihisku saslimšanu neviens nav imūns – ikviens var saslimt un izdarīt sabiedriski kaitīgu nodarījumu. Tādā gadījumā mums jābūt pārliecībai, ka valsts spēs adekvāti rīkoties, līdzsvarojot mūsu tiesības ar sabiedrības drošības prasībām.

Piespiedu ārstēšanas tiesiskā regulējuma aktualitāte Latvijā

Psihisko un uzvedības traucējumu gadījumā piespiedu ārstēšanas tiesiskais regulējums ir īpaši svarīgs, jo personas tiesības un brīvības tiek skartas daudz būtiskāk un ilgstošā laika posmā (bieži vien – vairākus gadus, retāk – gadu desmitus) nekā infekcijas slimību gadījumā (šādos gadījumos Latvijā ir iespējama tikai personas piespiedu izolēšana). Infekcijas slimību gadījumā personas sabiedriskā bīstamība ir diezgan objektīvi nosakāma – ar laboratorisku un citu izmeklējumu palīdzību (Epidemioloģiskās drošības likumā sniegta infekciozas personas jēdziena un infekcijas slimnieka jēdziena definīcija).

Psihiatrijā riska izvērtēšana un pierādīšana joprojām ir liels izaicinājums, bet tieši no tā izriet personas pamattiesību ierobežošana – medicīniska rakstura piespiedu līdzekļa piemērošana, turpināšana vai grozīšana (Latvijas Republikas Augstākās tiesas Krimināllietu departamenta 2017. gada [..] lēmums Lietā Nr. [..], SKK-[D]/2017 ECLI:LV:[..]. Pamats medicīniska rakstura piespiedu līdzekļa grozīšanai uz mazāk ierobežojošu un medicīniska rakstura piespiedu līdzekļa atcelšanai; Medicīniska rakstura piespiedu līdzekļa piemērošanas ilgums). Pastāv viedoklis, ka likumā ietvertais jēdziens "bīstams sabiedrībai" (attiecībā uz personām ar psihiskiem traucējumiem) ir ģenerālklauzula, kas ir vēl tikai jāpiepilda ar konkrētu saturu (Ribenere, 2018).

Pēc Latvijas Republikas Iekšlietu ministrijas Informācijas centra datiem, sakarā ar izvairīšanos no medicīniska rakstura piespiedu līdzekļa izpildes 2017. gadā meklēšanā bija pasludinātas deviņas pilngadīgas personas, atrastas piecas; 2018. gadā meklēšanā pasludinātas astoņas, atrastas četras; 2019. gadā – atbilstoši astoņas un piecas personas [1]. Diemžēl nevar noskaidrot, no kāda piespiedu līdzekļa personas ir izvairījušās, cik ātri bija sameklētas un vai ārstēšanas pārtraukšanai bija negatīvas sekas (atkārtots nodarījums, slimības paasinājums), kā arī tas, kas notika ar tām personām, kuras netika sameklētas.

Latvijā kopš 2012. gada tiek veikti mēģinājumi pilnveidot medicīniska rakstura piespiedu līdzekļa regulējumu (Augstākā tiesa, 2012; Ministru kabineta 2020. gada 29. aprīļa rīkojums Nr. 223). Par to, ka šis jautājums Latvijā ir aktuāls, norādīja Eiropas Cilvēktiesību tiesas spriedumi lietās *O.G. pret Latviju*, kuros bija teikts, ka Latvijas tiesas lēmumi par medicīniska rakstura piespiedu līdzekli ir deklaratīva rakstura un nenosaka to izpildīšanas kārtību (Eiropas Cilvēktiesību tiesas spriedums lietā *O. G. pret Latviju* (Nr. 2), Nr. 69747/13, 2016). Tiesībsargs izvirzīja to par vienu no 2017. gada prioritātēm (Medicine.lv, 13.12.2016.), un 2020. gada janvārī Tiesībsargs joprojām ir norādījis uz sistēmisko izmaiņu nepieciešamību medicīniska rakstura piespiedu regulējumā, starpdisciplināras sadarbības ieviešanu, lai sasniegtu medicīniska rakstura piespiedu līdzekļa virsmērķi – sabiedrības drošību un nodarījumu izdarījušās personas resocializāciju (Tiesībsarga vēstule Ministru prezidentam A. K. Kariņam, 17.01.2020.).

Laura Smukule maģistra darba izstrādes laikā (2016.–2017. g.) ir analizējusi 148 tiesu nolēmumus krimināllietās par medicīniska rakstura piespiedu līdzekļu noteikšanu un konstatējusi, ka daudzos nolēmumos trūkst personas sabiedriskās bīstamības izvērtējuma (Smukule, 2018). Neizpratni, kāpēc personai ar adekvātu uzvedību saglabājas sabiedriski bīstamās psihiski slimās personas statuss un tiek turpināts medicīniska rakstura piespiedu līdzeklis, paudusi Resursu centra cilvēkiem ar garīgiem traucējumiem "Zelda" juriste un atbalsta persona Kristīne Ribenere (Ribenere, 2018). Par to, ka tiek sniegts neadekvāts personas sabiedriskās bīstamības novērtējums un nepamatota rekomendācija tiesai nozīmēt medicīniska rakstura piespiedu līdzekli, ir aprakstītas šī raksta autoru iepriekšējās publikācijās (Kudeikina, Loseviča, 2021).

Skaidrs tiesiskais regulējums mūsdienās ir ļoti nepieciešams, jo piespiedu ārstējamo psihiski slimo personu skaits vairākās valstīs ir palielinājies (Barnett, Matthews, 2018), tiek integrētas starptautiskas tiesiskās normas, valstīm savstarpēji sadarbojoties, kā arī palielinās psihiatru krimināltiesiskās atbildības gadījumu skaits (Glancy, Glancy, 2009; Jonas, Nidal, 10.04.2013; Martinihin, 2019; Catanesi, Manna, 2016; Terranova, Rocca, 2016).

[1] Vien relatīvi nesen – 2020. gada 6. jūlijā – stājušies spēkā Krimināprocesa likuma grozījumi – 635. pants ir papildināts ar jaunu daļu, kurā paredzēta personas, kam piemērots medicīniska rakstura piespiedu līdzeklis, meklēšana.

Skaidri tiesiskie rāmji psihiatrijā (tiesiskās noteiktības princips) ir svarīgi, lai pasargātu un atturētu: pacientus – no medikalizācijas viņu uzvedības kontroles nolūkā, pārmērīgi augstas viņu sabiedriskās bīstamības novērtēšanas; ārstus – no profesionāla imperiālisma; valsti – no mēģinājuma savus pienākumus novelt uz mediķu pleciem, piemēram, uzticēt rūpes par sabiedrības drošību vai iedzīvotāju uzvedības kontroli, kā tas bija padomju okupācijas laikā specializētās psihiatriskās slimnīcās (Videneva, Iogolevich, 2015).

Piespiedu medicīniskās intervences

Pastāv vairākas situācijas, kad personas tiesības tiek ierobežotas veselības stāvokļa dēļ – piemēram, Latvijā epilepsijas gadījumā tiek liegtas tiesības vadīt transportlīdzekli, depresijas gadījumā – iegādāties, glabāt un lietot šaujamieročus; ārzemēs adipozie bērni tiek izņemti no ģimenēm (Murtagh, Ludwig, 2011); ņemot vērā Covid-19 pandēmijas izraisītos notikumus, sevišķi aktuāls izskatās Eiropas Cilvēktiesību tiesas (*European Court of Human Right* – ECHR) Lielās palātas spriedums bērnu obligāto profilaktisko vakcināciju lietās (Vavřička v. the Czech Republic, 2018 (Chappell, 08.04.2021.)). Latvijā ilgstošas sociālās aprūpes un sociālās rehabilitācijas institūciju iemītnieku tiesības brīvi pārvietoties var tikt ierobežotas (līdz pat izolēšanai), turklāt personas tiesības pārsūdzēt institūcijas vadītāja lēmumu nav atrunātas likumā (Sociālo pakalpojumu un sociālās palīdzības likums, 2002).

Latvijā piespiedu medicīniskās intervences sabiedrības drošības labā, ignorējot personas autonomijas principu un informētās piekrišanas institūtu, ir paredzētas psihisku un uzvedības traucējumu un infekcijas slimību gadījumos. Jāpiebilst, ka personām, kas sirgst ar atkarību slimībām, Latvijā ir iespējams piemērot piespiedu narkoloģiskās intervences – sociālās un psihosociālās rehabilitācijas piespiedu līdzekļu veidā (Ārstniecības likums, 1997), nepilngadīgajiem – arī audzinoša rakstura piespiedu līdzekļu ietvaros (ja ir saņemta bērna un viņa vecāku (aizbildņa) vai bāriņtiesas piekrišana) (Likums "Par audzinoša rakstura piespiedu līdzekļu piemērošanu bērniem", 2002), bet nosacīti notiesātajiem – tikai ar viņu piekrišanu (Ārstniecības likums, 1997). Tas atbilst t. s. kvazi piespiedu ārstēšanai (angļu val. *quasi-compulsory treatment*), ko piedāvā vairākās Eiropas valstīs atkarīgām personām un dzimumnoziedzniekiem) (Schaub, Michael, 2011).

Lai gan par kvalitatīvu informētu piekrišanu visos šajos gadījumos nevar runāt (jo persona izvēlas starp sodu un ārstēšanu), arī īsti piespiedu ārstēšana tā nav. Tāpēc turpmāk tiks aplūkota piespiedu intervence infekciju un psihisko traucējumu gadījumos (administratīvā kārtībā – psihiatriskās palīdzības sniegšana psihiatriskajā ārstniecības iestādē bez pacienta piekrišanas atbilstoši Ārstniecības likuma 68. pantam un krimināltiesiskā kārtībā – kā medicīniska rakstura piespiedu līdzeklis).

Personas tiesību un brīvību ierobežojums piespiedu ārstēšanas gadījumā

Ar piespiedu psihiatriskās ārstēšanas nozīmēšanu (administratīvi tiesiskā vai krimināltiesiskā kārtībā), vadoties no sabiedrības drošības interesēm un ignorējot personas informēto piekrišanu vai atteikšanos, valsts intereses saskaras ar personas (tostarp arī bērna) tiesībām ne vien uz brīvību, bet arī uz dzīvību un veselību, uz privātās dzīves neaizskaramību, kā arī tiesībām uz apziņas, domas un ticības brīvību.

Tiesības uz dzīvību un veselību – jo medicīnā, tostarp psihiatrijā, lietojamiem medikamentiem un metodēm pastāv nopietnu komplikāciju, paliekošu seku un nāves risks. Te ir saskatāmas nesaskaņas ar Ovjedo konvencijas principiem, kurā paredzēts, ka indivīda intereses ir pārākas par sabiedrības interesēm (Konvencija par cilvēktiesībām un biomedicīnu, 1997).

Tiesības uz privātās dzīves neaizskaramību: no privātās dzīves aspekta ķermenis cilvēkam ir visintīmākais, un piespiedu ārstniecības procedūru gadījumā tā fiziskās un psihiskās integritātes neaizskaramība tiek traucēta. Tiesības pieņemt lēmumu par savu bērnu un aizbilstamo ārstēšanu arī pieder pie privātās dzīves jomas. Ovjedo konvencijas 6. pantā noteikts, ka gadījumā, kad persona nevar sniegt informētu piekrišanu, medicīniska iejaukšanās var notikt tikai šīs personas tiešo interešu labā; nepilngadīgo ārstēšana, ja viņi nevar dot piekrišanu ar veselību saistītas darbības veikšanai, notiek tikai ar nepilngadīgās personas pārstāvja vai likumā noteiktas iestādes, personas vai instances atļauju; savukārt 7. pantā norādīts, ka personu ar nopietniem psihiskiem traucējumiem šo traucējumu ārstēšanai var pakļaut ar veselību saistītām darbībām bez šīs personas piekrišanas tikai tad, ja bez šādas ārstēšanas varētu rasties nopietns kaitējums šīs personas veselībai. Arī Bērnu tiesību konvencijā noteikts, ka valsts respektē un atzīst vecāku atbildību, tiesības un pienākumus nodrošināt bērnam viņam atbilstošu palīdzību un padomus šajā konvencijā atzīto tiesību izmantošanā (Bērnu tiesību konvencija, 1989). Valsts, nosakot personai piespiedu ārstēšanu ar nolūku pasargāt citus sabiedrības locekļus, personas morālās tiesības rūpēties par sevi (ikviena pienākums ir rūpēties par savu veselību un atbildīgi izturēties pret to – tā norādīts Satversmes ievada daļas piektās rindkopas ceturtajā teikumā un Ārstniecības likuma 5. pantā) pārvērš tiesiskajā pienākumā, ierobežojot personas rīcības brīvību – liedzot to darīt pēc saviem ieskatiem, kā tas izriet no Satversmes 111. panta (Satversmes tiesas 2002. gada 22. oktobra spriedums lietā Nr. 2002-03-04).

Tiesības uz apziņas, domu un ticības brīvību, kam var būt reliģiski, sociāli, filosofiski iemesli (individuāla dziļa pārliecība, ticība, apziņa). Personai, neraugoties uz viņas uzskatiem un viedokļiem par nepieskaitāmības iemesliem, ir jāapmeklē ārsts – psihiatrs, jāārstējas saskaņā ar konvencionālās medicīnas principiem, nerēķinoties ar personas sociokulturālām normām (piemēram, uzskatiem, ka psihiskā slimība ir bērnībā pārciestas psihotraumas rezultāts un ir ārstējama ar psihoterapiju). Šajos apsvērumos balstīti iebildumi lietot medikamentus var būt saistīti arī ar to, ka tajos ir cilvēka audu (kā *AstraZeneca*

un *Johnson & Johnson* vakcīnas koronavīrusa izraisītās slimības novēršanai) (Notes from Poland, 2021) vai dzīvnieku valsts produkti (želatīns, magnija stearāts, glicerīns, laktoze), kā arī želatīns *haram* (Pelčić, Karačić, 2016). Uzziņā, ko izsniedza Veselības ministrija vienam no raksta autoriem, ir paskaidrots – persona, kurai ir nozīmēts medicīniska rakstura piespiedu līdzeklis, atteikties no nozīmētās ārstēšanas drīkst tikai tad, ja tam ir medicīnisks pamatojums, kas atspoguļots medicīniskajā dokumentācijā. Ja ārstēšanas metode vai zāles izvēlētas, pamatojoties uz rūpīgu personas veselības stāvokļa, iespējamo kontrindikāciju un citu faktoru izvērtēšanu, kā arī atbilstoši pieņemtajam standartam, bet persona no ārstēšanās atsakās bez iepriekšminētā pamatojuma, šāds gadījums var tikt uzskatīts par medicīniska rakstura piespiedu līdzekļa nepildīšanu (Veselības ministrijas uzziņa, 2020). Līdz ar to, ignorējot informētās piekrišanas institūtu un paredzot iespēju atteikties no medikamentiem tikai medicīnisku kontrindikāciju gadījumā, valsts būtiski ierobežo ne vien pacienta tiesības, bet arī cilvēktiesības.

Parasti demokrātiskā sabiedrībā valsts, ierobežojot personas cilvēktiesības, paredz kādu kompensācijas mehānismu – piemēram, atsavinot īpašumu, kompensē tā vērtību; vairākās valstīs, kur profilaktiskās vakcinācijas ir obligātas (angļu val. *mandatory*), pastāv atsevišķs kompensāciju izmaksu tiesiskais regulējums – piemēram, Dānijā, Vācijā, Francijā, Japānā, Šveicē, Apvienotajā Karalistē (National Research Council, 1985), ASV, kur kompensācijās izmaksāti miljoniem dolāru (Health Resources & Services Administration, 2021). Tās ir tā saucamās kompensācijas shēmas bez vainas (angļu val. *no-fault compensation schemes*), kurās uzsvērts, ka pie vakcīnas blaknes nav vainojami mediķi vai vakcīnu ražotāji. Profilaktisko vakcināciju gadījumā ārstniecību (profilaksi) saņem personas (un bērni) – veselīgi indivīdi, kuru veselības stāvoklis var pasliktināties; tāpēc tiek uzskatīts, ka, ieviešot obligāto vakcināciju, tiek radīts "sociāls kontrakts" (valsts uzdevums – *autoru paskaidrojums*) rūpēties par tiem, kuri cietuši no vakcīnu blaknēm (respektīvi, cietuši pārējo drošības labā) (Attwell, Drislane, 2019). Aprakstot situāciju Latvijā, *Dr. iur.* Līga Mazure secina, ka nozīmīgākajos starptautiskajos un Eiropas Savienības ar vakcinācijas jautājumiem saistītajos dokumentos netiek akcentēta vakcīnas komplikāciju valstiskas kompensēšanas ideja un Latvijā nepastāv speciāli izveidots valsts atbalsta mehānisms pacientam ar vakcināciju radītā kaitējuma civiltiesiskajām sekām, paredzot pacientam tikai vispārīgus civiltiesiskās aizsardzības līdzekļus šajā gadījumā (Mazure, 2021).

Jāņem vērā, ka arī psihiatrijā pielietojamo medikamentu blaknes mēdz būt ļoti smagas, mokošas, dzīvību apdraudošas (piemēram, sirds apstāšanās) un paliekošas (sakarā ar centrālās nervu sistēmas bojājumu) un to lietošana negarantē labāku iznākumu. Pēdējos gados prasībās pret psihiatriem parādījusies jauna tendence – sakarā ar medikamentu blaknēm un metaboliem traucējumiem (Mela, Luther, 2016); farmācijas kompāniju izmaksātās kompensācijas mērāmas miljonos (Dyer, 2019). Pēc autoru domām, arī tad, ja psihisko un uzvedības traucējumu gadījumos personu ārstē piespiedu kārtā sabiedrības drošības nolūkā, veidojas īpašas sociāltiesiskās attiecības, un valstij ir jāparedz atsevišķs kompensācijas mehānisms kaitējuma gadījumā.

Tiesiskās attiecības piespiedu ārstēšanas laikā

Atbilstoši Augstākās tiesas atziņām piespiedu ārstējamie (piespiedu ārstniecībā nodotie) ir iestādei īpaši pakļautās personas – šajā gadījumā personas un valsts tiesiskās attiecības ir īpašas, persona faktiski ir īpaši pakļauta valstij. Tādā gadījumā attiecību tiesiskos pamatus nodibina, saturiski groza, tiesisko attiecību pamatus izbeidz, sodus piemēro, balstoties uz tādiem valsts lēmumiem, kas būtiski skar īpaši pakļautās personas cilvēktiesības, un tādi ir administratīvie akti (Augstākās tiesas lēmums lietā Nr. SKA-408/2010, 2010).

Viena no administratīvā akta pazīmēm ir, ka to izdod iestāde publisko tiesību jomā (Augstākās tiesas 2007. gada 5. februāra lēmums lietā Nr. SKA-103/2007, 2007). Iestāde šajā gadījumā "ir tiesību subjekts, tā struktūrvienība vai amatpersona, kurai ar normatīvo aktu vai publisko tiesību līgumu piešķirtas noteiktas valsts varas pilnvaras valsts pārvaldes jomā" (Administratīvā procesa likums, 2011), vai arī "institūcija, kura darbojas publiskas personas vārdā un kurai ar normatīvo aktu noteikta kompetence valsts pārvaldē, piešķirti finanšu līdzekļi tās darbības īstenošanai un ir savs personāls" (Valsts pārvaldes iekārtas likums, 2002).

Slimnīcas ir privāto tiesību juridiskās personas, un tās ārstnieciskā darbība notiek privāto tiesību jomā (Augstākās tiesas 2006. gada 17. janvāra lēmums lietā Nr. SKA-98/2006, 2006). Atbilstoši Valsts pārvaldes iekārtas likumam privāto tiesību juridiskajām personām var tikt deleģēti noteikti valsts pārvaldes uzdevumi (valsts vara), un, izpildot tos, privāto tiesību juridiskā persona kļūst par publiskās varas nesēju – iestādi (Augstākās tiesas lēmums lietā Nr. SKA-155/2008, 2008). Slimnīca tikai tad ir iestāde Administratīvā procesa likuma izpratnē, ja tā veic funkcijas valsts pārvaldes jomā (Augstākās tiesas lēmums lietā Nr. 6-80004416/37 SKA-889/2016, 2016) – piemēram, izsniedzot darbnespējas lapu, jo tas ir viens no valsts organizēto pasākumu kopuma elementiem, lai persona varētu īstenot savas sociālās tiesības uz valsts garantēto materiālo nodrošinājumu slimības gadījumā, kas paredzētas Satversmes 109. pantā. Ārstam tiek deleģēts valsts pārvaldes uzdevums – darbnespējas lapu izsniegšana, un ārsts šajā gadījumā darbojas publisko tiesību jomā (Augstākās tiesas lēmums lietā Nr. A42203205 SKA-103/2007, 2007).

Izskatot jautājumu par valsts apmaksāto pakalpojumu sniegšanu, no vienas puses, Augstākā tiesa atzina, ka līgumi, ko valsts slēdz ar ārstniecības iestādēm par valsts apmaksāto veselības aprūpes pakalpojumu sniegšanu un kompensējamo zāļu izrakstīšanu, ir publisko tiesību līgumi; tie tiek slēgti, lai nodrošinātu valsts pārvaldes funkcijas efektīvu izpildi – Satversmes 111. pantā valsts garantēto medicīniskās palīdzības minimuma nodrošināšanu ikvienam sabiedrības loceklim (Augstākās tiesas lēmums lietā Nr. SKA-365, 2017).

No otras puses, Augstākā tiesa atzina, ka slimnīca ārstniecības procesā neīsteno valsts pārvaldes pilnvaras (Augstākās tiesas lēmums lietā Nr. SKA-155/2008, 2008) un ka ārstēšanas gaitā vai nobeigumā izsniedzamie dokumenti ir ārstēšanas procesa sastāvdaļa,

darbība notiek privāto tiesību jomā un dokumenti netiek uzskatīti par administratīviem aktiem (piemēram, izraksts jeb epikrīze pēc ārstēšanas slimnīcas nodaļā vai ārsta lēmums par bērna ievietošanu un turēšanu psihiatriskajā slimnīcā) (Augstākās tiesas lēmums lietā Nr. SKA-1531/2017, 2017).

Parasti ārsta un pacienta attiecības ir līgumiskas, balstītas uz daudzpusēju darījumu un divpusēju līgumu, kurās dalībnieki ir līdztiesīgi, līdzvērtīgi, vēlas tiesisko attiecību seku iestāšanos. Bet ārstniecībā pušu brīvība ir vienpusēja – pacients ir brīvs gan savā izvēlē nodibināt / nedibināt ārstniecības tiesiskās attiecības, ja netiek aizskartas vai apdraudētas publiskās intereses, gan brīvs izvēlēties līguma otro pusi – ārstniecības iestādi (Mazure, 27.04.2021.).

Latvijā tiek uzskatīts, ka ārstniecības personai ir pienākums nodibināt ārstniecības tiesiskās attiecības, ja pacients izsaka gribu tās dibināt. Ārstniecības personai ir tiesības atteikties nodibināt tiesiskās attiecības ar konkrētu pacientu tikai noteiktos gadījumos, piemēram:

1) tiesības atteikties pārtraukt grūtniecību ētisku apsvērumu dēļ, ja tam nav medicīnisku iemeslu;
2) tiesības atteikt pirmo un neatliekamo medicīnisko palīdzību apstākļos, kas apdraud ārstniecības personas pašas dzīvību vai ārstniecības persona to nespēj veselības stāvokļa dēļ;
3) tiesības atteikties no pacienta, ja pacienta dzīvība nav apdraudēta un pacients neievēro ārsta norādījumus vai apzināti kaitē savai veselībai (Ārstniecības likums, 1997).

Daži ārzemju autori gan uzskata, ka "privātpraksēs psihiatri var izvēlēties, kurus pacientus viņi vēlas ārstēt", atrunājot, ka plānveida kārtībā palīdzību nevar atteikt, ja cits ārsts nav pieejams (Chaleby, 2001). Jebkuru tiesisku konfliktu gadījumā, ārsta–pacienta attiecībām iestājoties uz līguma pamata, pamatkoncepcija, uz kuras balstoties lieta tiks skatīta tiesā, būs ārsta pienākums rūpēties (angļu val. *duty of care*) par pacientu (Chaleby, 2001).

Latvijas Republikas Augstākās tiesas Senāta Administratīvo lietu departaments savulaik konstatēja: "Ciktāl ārstniecības personas un pacienta attiecības ir brīvprātīgas, balstītas uz pušu privātautonomiju, tās ir privāttiesiskas." (Senāta Administratīvo lietu departamenta spriedums lietā Nr. SKA-155/2008)

Ārstniecībā tiesiskās attiecības var rasties arī uz likuma pamata. Pie tādiem pieder neatliekamā medicīniskā palīdzība un piespiedu izolēšana, stacionēšana, ārstēšana publisko interešu labā infekcijas slimību un psihisko traucējumu gadījumā. Galvenā atšķirība starp saistībām uz tiesiskā darījuma pamata (līguma) un uz likuma pamata – līgumisko attiecību gadījumā sekas ir vēlamas abām pusēm (Mazure, 27.04.2021.).

Tas, ka likumā ir uzskaitīti ārsta pienākumi, nenozīmē, ka ārstniecības personām būtu deleģēti valsts pārvaldes uzdevumi, ārsta un pacienta attiecības nepārvēršas par publiski tiesiskām (Senāta Administratīvo lietu departamenta spriedums lietā Nr. SKA-155/2008).

Psihiatrs, strādājot gan valsts ambulatorā iestādē, gan privātpraksē, ir privāto tiesību subjekts, taču savās attiecībās ar Nacionālo veselības dienestu viņš, protams, darbojas publisko tiesību jomā, bet attiecības ar pacientu ārstniecības procesā tik un tā ir privāttiesiskas (neatkarīgi no tā, kas apmaksā ārsta darbu – pacients pats, apdrošinātājs vai valsts) un balstās kvalitatīvas informētās piekrišanas koncepcijā (Palkova, 2019).

Gadījumā, ja psihiatrs psihiatrisku palīdzību sniedz bez personas piekrišanas, viņš darbojas jau publisko tiesību jomā. Savulaik Veselības ministrija vēstulē vienam no raksta autoriem, izvērtējot psihiatru pienākumus saskaņā ar Ārstniecības likuma 68. un 69.[1] pantu, atzina, ka psihiatru darba jautājumi, kuri ir saistīti ar pacientu brīvības ierobežojumu, ir vērtējami kā deleģējums valsts pārvaldes uzdevumu veikšanai (Veselības ministrijas vēstule, 2014). Arī Tieslietu ministrija savā skaidrojumā Ārstniecības likuma 68. un 69.[1] panta regulējumu skaidri attiecina uz publiskām tiesībām (Latvijas Republikas Tieslietu ministrija, 2014). Līdzīgu nostāju pauda Tiesībsargs (Latvijas Republikas Tiesībsarga vēstule, 2014). Valsts šajā gadījumā nevis vienkārši maksā par veselības aprūpi pacienta vietā, bet gan ar ārstniecības personu rokām īsteno savu piespiedu varu pār personu, valda pār viņu.

Publisko tiesību jomā psihiatra tiesiskās atbildības pamatu veido nepieciešamība garantēt sabiedrības drošību – pienākums aizsargāt (angļu val. *duty to protect*), kurš izriet no pienākuma paredzēt agresiju, novērtēt vardarbības risku, proaktīvi rīkoties (angļu val. *duty to predict*) (Glancy, Glancy, 2009). Īstenībā vardarbības riska paredzēšana ir psihiatra ikdienas darba neatņemama sastāvdaļa (Phillips, 2012). Latvijā pienākums prognozēt psihiski slimās personas vardarbības risku ir noteikts vairākos tiesību aktos (Ārstniecības likumā, Ieroču aprites likumā, Ministru kabineta 2020. gada 4. februāra noteikumos Nr. 76 "Ieroču reģistra noteikumi", Kriminālprocesa likumā u. c.), tostarp arī nosakot nepieciešamību novērst noziedzīgu nodarījumu veikšanu pret bērna tikumību un dzimumneaizskaramību (Ministru kabineta 2018. gada 28. augusta noteikumu Nr. 555 10. pielikums). Bet kā ir ar sabiedrības drošības garantiju un cilvēktiesību aizsardzības funkcijas deleģēšanu ārstniecības iestādēm? Ar kādiem normatīvajiem aktiem tie tiek deleģēti un vai vispār var tikt deleģēti? Atcerēsimies – medicīniska rakstura piespiedu līdzekļa gadījumā personai tiek nevis nodrošinātas viņas tiesības, kas garantētas Satversmē (valsts maksā par personas veselības aprūpes pakalpojumiem), bet gan ierobežotas (valsts ierobežo vairākas personas tiesības un brīvības ar piespiedu mehānismu). Identiski ierobežojumi tiek uzlikti personai, sniedzot psihiatrisku palīdzību bez piekrišanas.

Dr. iur. Jeļena Groma savā promocijas darbā, atsaucoties uz vairākiem zinātniekiem, raksta, ka valsts uzdevumi ir ārējās un iekšējās aizsardzības uzdevumi; aizsardzības uzdevumi ir nemainīgi un ir valsts monopols – piespiedu vara valstī drīkst būt tikai valsts institūcijām un amatpersonām, nevis privātpersonām. Piespiedu (koercitīvā) vara (no latīņu val. *coercitus* – savaldīšana, sodīšana) ir varas forma, kas balstās uz draudiem un iespējas pielietot fizisko spēku, ierobežojot indivīda izvēles un rīcības brīvību. Demokrātiskā valstī piespiešana ir varas radīta. Piespiešana vienlaikus ir valsts pārvaldes

metode – tiesību ierobežojošā ietekme attiecībā uz likumpārkāpējiem ar mērķi aizsargāt un nodrošināt sabiedrības intereses, ko veic valsts pilnvarotas iestādes un citi subjekti. Bez piespiešanas nevar pastāvēt ne valsts, ne tiesības, piespiešana ir jebkuras sabiedrības sastāvdaļa, tā ietekmē šīs sabiedrības locekļu uzvedību, nodrošinot likumisku kārtību; piespiešana nosaka valsts pamatīpašības – valsts suverenitāti, valsts publiskās varas aparāta esību un valsts varas realizēšanu. Respektīvi, piespiešana ir komplicēts valstiski tiesisks veidojums, kas ietver tiesisko faktu valstisku izvērtējumu, kuram seko likumā nostiprināta rīcība; piespiešanas pamatu veido tiesību aktu normas; valsts kompetentās iestādes likumā paredzētajā kārtībā ietekmē noteiktu personu uzvedību ar mērķi aizsargāt sabiedrības drošību. Valsts publiskās varas aparātu veido valsts varas iestādes, pārvaldes iestādes, tiesa, prokuratūra u. c. (Groma, 2015).

Veselības aprūpes un ārstniecības jomā valsts publiskās varas aparāta pārstāvis ir Veselības inspekcija – saskaņā ar Ministru kabineta 2008. gada 5. februāra noteikumu Nr. 76 "Veselības inspekcijas nolikums" 2. punktu inspekcijas darbības mērķis ir īstenot valsts pārvaldes funkcijas veselības nozares uzraudzībā un kontrolē, lai nodrošinātu minēto jomu regulējošo normatīvo aktu prasību ievērošanu un izpildi (Augstākās tiesas spriedums lietā Nr. A420333014, 2014). Arī Slimību profilakses un kontroles centram ir būtiska loma valsts funkciju īstenošanā – tā darbības mērķis ir īstenot sabiedrības veselības politiku epidemioloģiskās drošības un slimību profilakses apakšjomās un veselības aprūpes politiku veselības aprūpes kvalitātes apakšjomā, nodrošināt veselības veicināšanas politikas īstenošanu un koordināciju (Ministru kabineta noteikumi Nr. 241, 2012).

Atsevišķos gadījumos valsts savas funkcijas var deleģēt citām personām – to regulē Valsts pārvaldes iekārtas likums (Valsts pārvaldes iekārtas likums, 2002).

Tātad tiesiskajā regulējumā par piespiedu ārstēšanu jāparedz iespēja, kā valsts iedarbinās šo piespiešanas mehānismu.

Valsts pārvaldes uzdevumu deleģēšana ārstniecības iestādēm

Valsts pārvaldes iekārtas likumā definēti principi, kā publiska persona privāto tiesību subjektam (ārstniecības iestādei) deleģē valsts pārvaldes funkciju – ar ārēju normatīvo aktu vai līgumu, attiecīgi izvēloties privātpersonu (ņemot vērā tās pieredzi, reputāciju, resursus, personāla kvalifikāciju, kā arī citus kritērijus) (Valsts pārvaldes iekārtas likums, 2002).

Ārstniecības iestādei valsts nevar deleģēt:

1) administratīvo aktu izdošanu – izņemot gadījumus, kad tas paredzēts ārējā normatīvajā aktā; tādi ir psihiatru konsilija lēmumi par psihiatriskās palīdzības sniegšanu psihiatriskajā ārstniecības iestādē bez pacienta piekrišanas (Eiropas Cilvēktiesību tiesas spriedums lietā *L. M. pret Latviju*, 2011). Identiska tiesiskā daba piemīt ārstu speciālistu un konsiliju atzinumiem, uz kuriem

visbiežāk balstās tiesa, lemjot par medicīniska rakstura piespiedu līdzekļa turpināšanu, grozīšanu, atcelšanu. Arī šī dokumenta mērķis ir sniegt tiesai ārstu viedokli par personas veselības stāvokļa (konstatējot faktisku situāciju) atbilstību likumā minētajiem kritērijiem. Dokuments būtiski skar iestādei īpaši pakļauto personu cilvēktiesības un tiek izdots publisko tiesību jomā. To izsniedz privāto tiesību iestāde uz likuma pamata (respektīvi, tam piemīt visi administratīva akta kritēriji) (Eiropas Cilvēktiesību tiesas spriedums lietā *L. M. pret Latviju*, 2011);

2) pārvaldes uzdevumus, kas saistīti ar valsts ārējās un iekšējās drošības funkciju izpildi (izņemot gadījumus, kad tas paredzēts likumā). Pēc darba autoru domām, par tādu valsts pārvaldes uzdevumu jāuzskata psihiski slimās personas atkārtota sabiedriski kaitīga nodarījuma prevencija un noteiktu infekcijas slimību izplatības apkarošana. Valsts pārvaldi epidemioloģiskās drošības jomā īsteno Epidemioloģiskās drošības likuma 2. nodaļā minētās institūcijas, lielākoties Veselības ministrijas pakļautībā esošās Veselības inspekcijas darbinieki, un likumā ir noteiktas tikai četras slimnīcas, kurās veicama personu obligātā un piespiedu izolēšana un ārstēšana. Psihiatriskām iestādēm šī pārvaldes funkcija nav deleģēta ar likumu, nav atlasīto ārstniecības iestāžu uzskaitījuma – ikvienā psihiatru praksē var realizēt medicīniska rakstura piespiedu līdzekli neatkarīgi no esošiem resursiem un kompetences, un ārstam ir pienākums pildīt tiesas lēmumu (Eiropas Cilvēktiesību tiesas spriedums lietā *L. M. pret Latviju*, 2011);
3) pārvaldes uzdevumus, kas nodrošina Latvijas Republikas Satversmē garantēto cilvēktiesību īstenošanu un uzraudzību un kuru izpildes kārtību un institūciju ir noteicis likumdevējs. Par tādu uzdevumu būtu jāuzskata ar personas tiesību un brīvību ierobežošanu saistītas darbības (piespiedu personas nogādāšana un paturēšana ārstniecības iestādē, psihisko un uzvedības traucējumu gadījumos – arī ierobežojošu līdzekļu pielietošana; par pamattiesību ierobežošanu atzīstams arī kā medicīniska rakstura piespiedu līdzeklis (Krimināllietu departamenta lēmums lietā Nr. SKK-[D]/2017. Infekcijas slimību gadījumos šo valsts pārvaldes uzdevumu pilda Veselības inspekcija sadarbībā ar Valsts policiju. Psihiatriskās piespiedu ārstēšanas (administratīvā un krimināltiesiskā kārtībā) gadījumā lēmuma pieņemšanas un kontroles funkcija ir tiesas kompetencē – jāatzīst, ka kontrole ir tikai administratīva rakstura. Darba autori piekrīt vairāku pētnieku viedoklim, ka, gan sniedzot psihiatrisku palīdzību bez pacienta piekrišanas, gan realizējot medicīniska rakstura piespiedu līdzekli, intervenču juridisks mērķis ir viens – sabiedrības un pašas personas drošība (Kalinina, 2009);
4) citus pārvaldes uzdevumus, kuri pēc savas būtības ir valsts pārvaldes funkcijas pamats un kurus drīkst veikt tikai iestādes (Valsts pārvaldes iekārtas likums, 2002).

Tā kā slimnīcas ir privāto tiesību juridiskās personas (Senāta Administratīvo lietu departamenta spriedums lietā Nr. SKA-155/2008), pēc darba autoru domām, tām nevar uzticēt un deleģēt cilvēktiesību īstenošanu un uzraudzību un sabiedriski bīstamo psihiski slimo personu ārstēšana paliek valsts publisko personu uzdevums, ko nevienai slimnīcai (vai ārstu praksei) nevar deleģēt.

Piespiedu intervences infekcijas slimību gadījumā

Analizējot valstiskus piespiešanas mehānismus infekcijas slimību gadījumā, ir jāsāk ar vēsturisko metodi. Pēc Napoleona karagājieniem Eiropā sevišķi izplatījās veneriskās slimības: sifiliss un gonoreja. Krievijas Impērijā cīņai ar šīm slimībām prostitūcijas reglamentācijas ietvaros pie Iekšlietu ministrijas tika izveidotas medicīniski policejiskas komitejas, kuras sevī apvienoja mūsdienu tikumības policijas un veneroloģiskā dispansera funkcijas – konstatējot personai saslimšanas pazīmes (prostitūtai, aizturētai "aizdomīgai" sievietei, fabrikas strādniekam), persona tika nosūtīta uz piespiedu ārstēšanu slimnīcā (Niznik, 2012). Komiteju uzdevums bija arī izveidot hospitāļus, kur sifilisa slimniekus varētu ārstēt bez maksas (Miltiņš, 1997). Rīgas komitejā, kas tika dibināta 1843.–1845. gadā kā viena no pirmajām Rīgā, kā arī Sanktpēterburgā, Varšavā un Kazaņā prostitūcijas un venerisko slimību uzraudzība bija organizēta vislabāk. Rīga bija vienīgā no Krievijas Impērijas pilsētām, kur medicīniski policejiskās komitejas darbību reglamentēja īpašs noteikumu kodekss, kas tika apstiprināts gan tikai 1854. gada janvārī (Miltiņš, 1997). Rīga bija arī starp tām pilsētām, kur komitejas policejiskā un medicīniskā funkcija bija apvienotas vienā institūcijā un atradās vietējās policijas pārziņā (Niznik, 2012). Savukārt veneriskās slimnīcas un vājprātīgo nami Krievijā atradās tā saucamo Dievam tīkamo iestāžu sastāvā un arī ilgstoši bija Iekšlietu ministrijas pārziņā. Rīgā venerisko un psihisko slimību ārstēšana vienuviet – Dievam tīkamo iestāžu kompleksā Aleksandra Augstumos – turpinājās līdz pat Otrajam pasaules karam (iestāžu nosaukums tika vairākkārt mainīts, mūsdienās – VSIA "Rīgas Psihiatrijas un narkoloģijas centrs") (Kuzņecovs, Loseviča, 2014).

Šobrīd Latvijā noteiktu infekcijas slimību gadījumos ir iespējama personas obligāta un piespiedu izolēšana, lai novērstu citu cilvēku inficēšanos vai veiktu medicīniskās un laboratoriskās pārbaudes. Epidemioloģiskās drošības likumā un attiecīgi Ministru kabineta noteikumos noteiktas visu iesaistīto pušu (valsts un pašvaldības iestāžu, ārstniecības iestāžu un to darbinieku, policijas darbinieku un izolējamo personu) tiesības un pienākumi, sniegta epidemioloģiskās drošības un uzraudzības definīcija, noteikti epidemioloģiskās drošības pasākumi, obligātās medicīniskās un laboratoriskās pārbaudes, kā arī obligātās un piespiedu izolēšanas un ārstēšanas finansēšanas kārtība (Epidemioloģiskās drošības likums, 1997). Lēmumu par personas piespiedu izolēšanu pieņem Veselības ministrijas pakļautībā esošās Veselības inspekcijas vadītājs vai viņa vietnieki pēc ārstniecības personas pieprasījuma. Lēmuma izpildi kontrolē Veselības inspekcijas inspektori (Ministru kabineta noteikumi Nr. 413, 2015). Lēmumam par personas

piespiedu izolēšanu seko rīkojums par personas piespiedu izolēšanu. Personai ir tiesības rīkojumu apstrīdēt Veselības ministrijā. Veselības ministrijas lēmumu var pārsūdzēt tiesā. Tiesību normās definēti nosacījumi, pēc kuriem persona tiek izolēta ārstniecības iestādē. Tajās paredzēta sadarbība ar Valsts policijas iestādes teritoriālo struktūrvienību un nosauktas četras ārstniecības iestādes, kurās veicama personu obligātā un piespiedu izolēšana un ārstēšana, kā arī paredzēts administratīvs sods par epidemioloģiskās drošības prasību pārkāpšanu. Piespiedu medicīniskas manipulācijas (antibiotiku ievadīšana bez personas piekrišanas) likumā nav paredzētas. Salīdzinājumam – piemēram, Dānijā piespiedu ārstēšana (nevis tikai izolēšana un ierobežošana, kā tas ir Latvijā) ir iespējama ne vien psihisko traucējumu (ar medikamentiem, elektrokonvulsīvo terapiju un piespiedu barošanu, tostarp caur zondi), bet arī dzīvību apdraudošu fizisku saslimšanu gadījumā (Brandt-Christensen, 2012).

Secinājumi

Epidemioloģisko drošību valsts ir atzinusi par valsts pārvaldes uzdevumu, nodrošina to ar valsts iestāžu palīdzību (Veselības inspekciju, policiju), pamatojoties uz īpašu likumu, un realizē tikai speciāli izvēlētās ārstniecības iestādēs. Normas īstenošana ar valsts iestāžu palīdzību un piespiešanas mehānismu saglabājas kopš 19. gadsimta vidus. Infekciju slimību gadījumā Latvijā piespiedu kārtā ir iespējama tikai personas obligāta un piespiedu izolēšana. Piespiedu intervenču laikā ārsta un personas attiecības pārsvarā saglabājas privāttiesiskas. Piespiedu medicīnisko intervenču regulējums infekcijas slimību gadījumos atbilst tiesību normas principiem. Savukārt piespiedu psihiatriska ārstēšana ir valsts pārvaldes uzdevums iekšējās drošības un cilvēktiesību aizsardzības jomā, kuru nevar deleģēt ārstniecības iestādēm – privāto tiesību personām – un kurš būtu jārealizē ar valsts institūciju palīdzību.

Raksta autori izsaka pateicību Iekšlietu ministrijas Informācijas centram par statistikas datu sagatavošanu un izsniegšanu.

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Bezpilota gaisa kuģu (dronu) izmantošanas tiesiskie aspekti

Legal Aspects of Use of Unmanned Aircrafts (Drones)

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Abstract

In today's technology world, development of unmanned aircrafts is happening very rapidly, and the laws and regulations governing this specific area are constantly supplemented at both – level of European Union and nation-wide. They are aimed at incorporating unmanned aircrafts in air traffic, to comply safety, security, and privacy requirements, and not to pose any risks to the environment. Opportunities of using this technical mean are versatile and it can be a good assistant in various areas. Unmanned aircrafts are widely used by the civil sector and the military sector and, in the recent years, these specific means have been used by rescue services and security institutions.

Unfortunately, it should be admitted that unmanned aircrafts are also used in terrorist and other criminal activities, so it is essential to control the flight environment by preventing unauthorised flights for ensuring general safety. The responsible institutions also have been working in this direction. Until July 1st, 2021, in the current Cabinet Regulation No 368 "Regulations for Performing Flights of Unmanned Aircrafts and Other Types of Aircrafts", there was found a term "state unmanned aircraft", which regulated the areas in which state unmanned aircrafts can be used, for example, in investigation and detection of criminal offences, but there was no further explanation in more detail. The Cabinet Regulations, which came into force on July 1st, 2021, explain in more detail the rights and obligations of pilots of state unmanned aircrafts. However, these regulations do not provide specific information on the use of unmanned aircrafts in measures of operational activities. Therefore, this issue is controversial and should be raised for updating.

Keywords: unmanned aircrafts, operational activities.

Ievads

Pētījums par bezpilota gaisa kuģu pielietojumu operatīvās darbības pasākumos tapa, veicot problēmas teorētisko izpēti un balstoties uz praktisko pieredzi. Operatīvās darbības subjektu amatpersonām, kas, aizstāvot valsts intereses, pilda dienesta pienākumus un ievēro Operatīvās darbības likuma 4. pantā (Operatīvās darbības likums, 1993) noteiktos principus, nevajadzētu rasties šķēršļiem, lai izmantotu bezpilota gaisa kuģus dienesta pienākumu pildīšanai. Tomēr ir nepieciešams noteikt kopējās vadlīnijas, lai operatīvās darbības pasākumu laikā netiktu pārkāptas robežas attiecībā uz privātumu un cilvēktiesībām.

Jebkuram bezpilota gaisa kuģa pilotam ir nepieciešamas specifiskas zināšanas par tā lietošanu un citām jomām, lai izvairītos no negadījumiem. Ja nebūs skaidri noteikti principi, kas jāievēro operatīvajiem darbiniekiem, veicot operatīvās darbības pasākumus vai speciālās izmeklēšanas darbības, tad sarežģītās situācijās viņu rīcību iespējams traktēt kā darbību, kura bijusi pretrunā ar likumu, tādējādi ietekmējot tālāko dienesta gaitu un zaudējot vēlēšanos nākotnē pilotēt bezpilota gaisa kuģus.

Vairāki normatīvie akti regulē civilo aviāciju, arī bezpilota gaisa kuģu nozari. Civilā aviācija un bezpilota gaisa kuģu nozare ir cieši saistītas un nav nodalāmas – arī bezpilota gaisa kuģi var būt dažāda lieluma un svara. Normatīvajos aktos, piemēram, noteikts augstums, virs kura pilots nedrīkst pacelt bezpilota gaisa kuģi, lai neiejauktos civilās aviācijas satiksmē un neizraisītu negadījumus. Jebkuram pilotam ir jāievēro vispārējās normatīvo aktu prasības, kuras saistās ar aviāciju, – arī tiem pilotiem, kuri veic lidojumus operatīvās darbības subjektu uzdevumā vai arī citu operatīvo dienestu uzdevumā. Tomēr šobrīd nav neviena iekšējā normatīvā akta, kas reglamentētu bezpilota gaisa kuģu izmantošanu operatīvās darbības pasākumu laikā. Domājams, būtu jānodala bezpilota gaisa kuģu izmantošana operatīvās darbības pasākumu laikā un kriminālmeklēšanas pasākumu laikā, lai gan šie abi pasākumi ir cieši saistīti.

Šā pētījuma mērķis bija izanalizēt bezpilota gaisa kuģa kā tehniskā līdzekļa izmantošanu operatīvās darbības pasākumu kontekstā, izdarīt secinājumus un sniegt priekšlikumus normatīvo aktu pilnveidei. Domājams, ka, nosakot kopējas vadlīnijas šajā nozarē, tiktu atvieglotas dienesta gaitas operatīvās darbības subjektu amatpersonām.

Pētījumā izmantota deskriptīvā, salīdzinošā, deduktīvā metode un tiesību normu interpretācijas metode.

Bezpilota gaisa kuģu rašanās vēsture un tagadne

Cilvēku vēlme iekarot debesis ir bijusi mūžīga, un jau pirms daudziem gadsimtiem tika veikti mēģinājumi to izdarīt, taču sākotnējie centieni beidzās neveiksmīgi un pat letāli. Par pirmajiem gaisa kuģiem ir uzskatāmi gaisa pūķi un gaisa baloni. Ar laiku, attīstoties aviācijas zinātnei, tika izgudrotas lidmašīnas un citi lidaparāti, kas spēj noturēties gaisā. Mūsdienās jau eksistē vairāku veidu un izmēru gaisa kuģi, sākot no nelielām lidmašīnām un beidzot ar kosmosa kuģiem.

Pirmie bezpilota gaisa kuģi, kā jau daudzi izgudrojumi, tika radīti militārajām vajadzībām 20. gadsimta pirmajā pusē. Apzīmējums "drons" (angļu val. *drone* – trans) radies no tā, ka pirmie bezpilota gaisa kuģi radīja lapsenes vai bites dūkšanai līdzīgu skaņu, arī mūsdienās tā nav mainījusies. Šis apzīmējums sākotnēji tika izmantots, lai apzīmētu bezpilota gaisa kuģi, ko izmanto militāriem mērķiem, tomēr šobrīd ar to saprot jebkuru bezpilota gaisa kuģi (visbiežāk attiecinot uz multirotoru bezpilota gaisa kuģiem). Pat profesionāļi ikdienā izmanto vārdu "drons", tomēr tas netiek uzskatīts par oficiālo civilās aviācijas terminu. Jāpiebilst, ka ir radīti ne tikai gaisa droni, bet arī līdzīgi ūdens un zemes aparāti. Šāda veida droni tiek izmantoti, lai piekļūtu vietām, kurās cilvēkam būtu neiespējami, apgrūtinoši vai pat dzīvībai bīstami ievirzīties, piemēram, okeāna dzīlēs vai sprādzienbīstamās vietās. Var secināt, ka dažāda veida attālināti vadāmas tehniskas ierīces, izņemot bērnu rotaļlietas, var uzskatīt par droniem.

Šajā rakstā tiek aplūkoti bezpilota gaisa kuģi jeb droni, kurus parasti uztver kā multirotoru lidaparātus. Multirotoru bezpilota gaisa kuģi var būt dažādu izmēru, no dažiem centimetriem diametrā, kurus izmanto iekštelpās, līdz pat vairākiem metriem diametrā, kurus izmanto galvenokārt industriālām vajadzībām. Šo lidaparātu svara amplitūda var būt no dažiem gramiem līdz pat vairākiem kilogramiem un attālums, ko tie spēj veikt, – no dažiem metriem līdz vairākiem desmitiem kilometru. Viens no iecienītākajiem bezpilota gaisa kuģu veidiem, ko izmanto, ir aprīkots ar četriem rotoriem – šādā veidā manevrēšana ir daudz vieglāka. Taču ir sastopami arī lidaparāti ar sešiem un astoņiem rotoriem. Jāpiebilst, ka rotoru skaits ir atkarīgs no lidaparāta izmēra un no tā, kādiem mērķiem tas paredzēts un kādai jābūt tā celtspējai. Rūpnieciski ražoti bezpilota gaisa kuģi nav vienīgie šajā sfērā, ir arī daudzi inženieri vai aviācijas entuziasti, kas būvē bezpilota gaisa kuģus paši, bet arī uz viņiem attiecas normatīvais regulējums.

Mūsdienīgiem bezpilota gaisa kuģiem ir dažādas funkcijas, piemēram, stabilizācijas funkcija, automātiska lidojuma un atgriešanās mājās funkcija, kas atvieglo pilotam to vadīšanu. Viena no produktīvākajām iespējām, veicot bezpilota gaisa kuģu lidojumus, ir iespēja, ka pilots uz tālvadības pulti saņem telemetrijas datus un spēj redzēt visu ar lidaparāta "acīm".

Bezpilota gaisa kuģu izmantošanas jomas

Jāuzsver, ka bezpilota gaisa kuģis ir vispusīgs tehniskais līdzeklis un tā pielietojums ir ļoti plašs. Šajā rakstā minēti tikai daži izmantošanas veidi. Izklaides industrija, piemēram, ir nozare, kurā šie tehniskie līdzekļi tiek lietoti ļoti bieži, jo mūsdienās grūti atrast kādu mākslas filmu vai kāzu video, kurā nebūs no bezpilota gaisa kuģa uzņemtu kadru. Nekustamo īpašumu tirgū populāri ir fiksēt pārdodamo īpašumu no gaisa, lai vēlāk to sekmīgāk reklamētu.

Lauksaimniecībā, būvniecībā, loģistikā un enerģētikā tiek izmantoti tikai profesionāli bezpilota gaisa kuģi, lai veiktu apsekošanu, mērniecību, smidzināšanu un pat kravu pārvadāšanu. Līdzīgi notiek arī vides monitorings.

Bezpilota gaisa kuģu izmantošana operatīvo dienestu funkciju realizēšanai

Bezpilota gaisa kuģus var izmantot ne tikai operatīvās darbības pasākumu nodrošināšanai un atbalstam, bet arī Valsts policijas, muitas, Valsts robežsardzes, Valsts ugunsdzēsības un glābšanas dienesta darbā, kā arī citu dienestu vajadzībām. Jomas, kurās bezpilota gaisa kuģi var sniegt atbalstu minētajām iestādēm, ir daudzas, to pielietojums ir atkarīgs no vajadzībām un pilotu profesionālajām spējām tos izmantot.

Objektu apskatēs vai izpētēs izmantošana ir daudzpusīga, piemēram, lai izpētītu teritoriju, kur notiks masu pasākumi, lai konstruktīvi tiktu izvietoti visi kārtības sargu posteņi un pasākumu laikā kontrolētu cilvēku plūsmas. Sekmīgi bezpilota gaisa kuģus var lietot glābšanas dienesti, lai pirms glābšanas operācijām noteiktu kritiskās vietas un mazinātu riskus, kas var rasties glābšanas darbu laikā. Robežsardze sekmīgi izmanto bezpilota gaisa kuģus, lai apsekotu robežas un fiksētu robežpārkāpējus.

Policija ar bezpilota gaisa kuģu palīdzību var realizēt notikuma vietas apskati (sevišķi – ārpus telpām), 3D formātā fiksējot katru sīkāko detaļu, lai nepieļautu cilvēka kļūdas faktoru, īpaši aktuāli tas ir pēc smagām avārijām vai pasūtījuma slepkavībām. Kriminālprocesuālajās izmeklēšanas darbībās būtu lietderīgi šo tehnisko līdzekli izmantot, lai fiksētu liecību pārbaudi uz vietas, ja to pieļauj notikušā apstākļi.

Vairāku operatīvo dienestu funkciju izpildē būtisku lomu bezpilota gaisa kuģi ieņem meklēšanas darbos. Meklēšanas darbi var būt saistīti ar pazudušu personu, zagtu transportlīdzekļu, ūdens objektu u. c. objektu meklēšanu. Savu lietderību bezpilota gaisa kuģi šāda veida uzdevumos ir apliecinājuši vairākkārt. Vasaras sezonā, kad aktuāla ir sēņošana, ogošana vai atpūta mežos un cilvēki mēdz apmaldīties, būtiska ir katra minūte, lai pazudušos atrastu. Meklēšanas darbos bezpilota gaisa kuģi spēj īsā laikā apsekot plašas teritorijas un ieekonomēt cilvēku resursus, turklāt meklēšanas darbus var turpināt arī diennakts tumšajā laikā, izmantojot termālās kameras.

Bezpilota gaisa kuģu aprīkojumā ietilpst vairākas ierīces, un viena no visbiežāk izmantojamām ir videokamera. Dārgākiem modeļiem videokameras ir iespējams nomainīt vai arī vienlaikus izmantot vairākas kameras. Bezpilota gaisa kuģi var izmantot arī kombinācijā ar citiem tehniskajiem līdzekļiem. Situācijās, kad būtu nepieciešams konkrētā teritorijā izmērīt gaisa piesārņojumu, pievienojot ierīci šādām vajadzībām bezpilota gaisa kuģim, mērījumus būtu iespējams veikt daudz operatīvāk un lētāk nekā ar helikopteriem vai citiem lidaparātiem. Jāuzsver, ka situācijas var būt dažādas un viss ir atkarīgs no tehniskajām iespējām – izmantojot dažādās bezpilota gaisa kuģa iespējas, variācijas ir neierobežotas.

Eiropas Savienības normatīvais regulējums

2019. gadā stājās spēkā divas Eiropas Komisijas regulas, kas tiešā veidā ietekmēja turpmāko kārtību, kā veicami bezpilota gaisa kuģu lidojumi, tostarp Latvijas Republikas teritorijā. Turklāt tika veiktas pakāpeniskas izmaiņas nacionālā līmeņa normatīvajā

regulējumā. ES 2019/947 regula par bezpilota gaisa kuģu ekspluatācijas noteikumiem un procedūrām (Komisijas Īstenošanas regula, ES 2019/947), lai izveidotu Eiropas bezpilota gaisa kuģu sistēmu ekspluatantu reģistru un veiktu daļējas izmaiņas nacionālajā regulējumā, Latvijā daļēji tika ieviesta ar 2021. gada 1. janvāri, bet ar 2021. gada jūliju stājās spēkā Ministru kabineta noteikumi, kas pilnībā pielāgoti šīm prasībām. 2022. gada 1. janvārī noslēdzas pārejas periods, un nacionālajam normatīvajam regulējumam būs jāatbilst Eiropas Komisijas regulām. Balstoties uz Eiropas Padomes Regulas ES 2019/945 par bezpilota gaisa kuģu sistēmām un trešo valstu bezpilota gaisa kuģu sistēmu ekspluatantiem (Komisijas Deleģētā regula, ES 2019/945) prasībām, no 2023. gada 1. janvāra būs atļauts tirgot tikai tādas bezpilota gaisa kuģu sistēmas, kuras atbilst minētās regulas prasībām.

Eiropas Parlamenta un Padomes Regulā ES 2018/1139 par kopīgiem noteikumiem civilās aviācijas jomā un ar ko izveido Eiropas Savienības Aviācijas drošības aģentūru (Eiropas Parlamenta un Padomes Regula, ES 2018/1139) ir ietvertas vairākas definīcijas. Par tām un šo Eiropas Padomes regulu būtību – turpinājumā.

Eiropas Padomes Regulā ES 2019/945 par bezpilota gaisa kuģu sistēmām un trešo valstu bezpilota gaisa kuģu sistēmu ekspluatantiem (Komisijas Deleģētā regula, ES 2019/945) ir noteiktas projektēšanas un ražošanas prasības bezpilota gaisa kuģu sistēmām, kuras paredzēts ekspluatēt saskaņā ar noteikumiem un nosacījumiem, kas definēti Īstenošanas regulā ES 2019/947 (Komisijas Īstenošanas regula, ES 2019/947), un attālās identifikācijas papildierīcēm. Tajā arī noteikts bezpilota gaisa kuģu sistēmu veids, kura projektēšanu, ražošanu un apkopi vajag sertificēt.

Eiropas Savienības Parlamenta un Padomes Regulā 2018/1139 (Eiropas Parlamenta un Padomes Regula, ES 2018/1139) ir dota bezpilota gaisa kuģa definīcija – tas ir jebkurš gaisa kuģis, ko ekspluatē vai kas konstruēts autonomai ekspluatācijai vai pilotēšanai no attāluma bez pilota gaisa kuģī. Savukārt bezpilota gaisa kuģa tālvadības ierīce ir definēta kā jebkurš bezpilota gaisa kuģa drošai ekspluatācijai nepieciešams instruments, ierīce, mehānisms, aparāts, piederums, programmatūra vai papildierīce, kas nav bezpilota gaisa kuģa sastāvdaļa un kas neatrodas minētajā bezpilota gaisa kuģī. Eiropas Komisijas Īstenošanas regulā ES 2019/947 (Komisijas Īstenošanas regula, ES 2019/947) ir definēta bezpilota gaisa kuģa sistēma – bezpilota gaisa kuģis un aprīkojums, ko izmanto, lai to vadītu no attāluma.

Svarīgi būtu nodalīt bezpilota gaisa kuģa tālvadības pilotu no ekspluatanta, jo saskaņā ar Regulu ES 2019/947 (Komisijas Deleģētā regula, ES 2019/945) bezpilota gaisa kuģa sistēmas ekspluatants ir jebkura juridiska vai fiziska persona, kas ekspluatē vai plāno ekspluatēt vienu vai vairākas bezpilota gaisa kuģa sistēmas, bet tālvadības pilots, atsaucoties uz Eiropas Parlamenta un Padomes Regulu ES 2018/1139 (Eiropas Parlamenta un Padomes Regula, ES 2018/1139), ir fiziska persona, kas atbildīga par bezpilota gaisa kuģa lidojuma drošu vadīšanu, proti, tā manuāli apkalpo lidojuma vadības ierīces vai, ja bezpilota gaisa kuģis lido autonomi, pārrauga tā kursu un saglabā spēju jebkurā brīdī iejaukties un mainīt kursu.

No šeit minētā var secināt, ka ir trīs pamatregulas, kuras reglamentē noteikumus bezpilota gaisa kuģu jomā un sniedz definīcijas, kas tiek oficiāli izmantotas bezpilota gaisa kuģu nozarē.

Tālvadības pilotiem būtu jāpārzina arī citas Eiropas regulas, kas saistās ar bezpilota gaisa kuģu ekspluatāciju: Komisijas Īstenošanas regula ES 2017/373 (Komisijas Īstenošanas regula, ES 2017/373), ar ko noteiktas kopīgas prasības gaisa satiksmes pārvaldības / aeronavigācijas pakalpojumu sniedzējiem un citu gaisa satiksmes pārvaldības tīkla funkciju nodrošinātājiem un to uzraudzībai, un Komisijas Īstenošanas regula, ar ko noteikti vienoti lidojumu noteikumi un ekspluatācijas normas aeronavigācijas pakalpojumiem un procedūrām.

Latvijas Republikas nacionālais regulējums

Likumā "Par aviāciju" (Par aviāciju, 1994) ir noteiktas galvenās struktūras un definīcijas gaisa satiksmes regulēšanā Latvijas Republikas teritorijā. No 2021. gada 1. janvāra šajā likumā ir ietverta un stājusies spēkā 11.[1] nodaļa (Bezpilota gaisa kuģi un to sistēmas) un vairāki panti, kuri attiecas uz bezpilota gaisa kuģu nozari (Par aviāciju, 1994). Īpaši jāizceļ 124.[1] pants, kurā ir noteikti administratīvie pārkāpumi bezpilota gaisa kuģu jomā. Līdz 2021. gada 1. janvārim kārtība, kā piemēroja sodus par pārkāpumiem, bija citādāka, respektīvi, tā tika pamatota ar Latvijas Administratīvo pārkāpumu kodeksa 220. pantu, likuma "Par aviāciju" 6. panta otrās daļas 1. un 4. punktu, Civilās aviācijas aģentūras direktora 2019. gada augusta rīkojumu Nr. 01-1/12.

Tomēr, domājams, ne visu sodu piemērošanu var vērtēt viennozīmīgi, jo var rasties sarežģījumi pārkāpumu pierādīšanā. Piemēram, ja pilots atrodas alkohola ietekmē, tā koncentrācijai asinīs pārsniedzot 0,2 promiles, to var fiksēt diezgan vienkārši, turpretī lidojumus ārpus tiešās redzamības fiksēt un pierādīt ir ļoti grūti, īpaši gadījumos, ja pilots pats neatzīst savu vainu. Šādās situācijās, ja nav noticis nopietns negadījums, pierādīšanas process varētu būt visai dārgs un nelietderīgs, jo vajadzētu modelēt konkrēto situāciju (nepieciešams attiecīga izmēra bezpilota gaisa kuģis, attiecīgie laika apstākļi u. tml.).

Līdz 2021. gada 1. jūlijam spēkā bija Ministru kabineta 2019. gada 13. augusta noteikumi Nr. 368 "Kārtība, kādā veicami bezpilota gaisa kuģu un cita veida lidaparātu lidojumi" (Ministru kabineta noteikumi Nr. 368, 2019), bet kopš 2021. gada 1. janvāra vairāki no minēto noteikumu punktiem vairs nav spēkā, piemēram, Ministru kabineta noteikumu Nr. 368 14. punkts, kurā bija minēts, ka "Latvijas Republikas gaisa telpā var veikt lidojumus ar bezpilota gaisa kuģi un lidaparātu, ja tas ir marķēts ar tā īpašnieka vai valdītāja vārdu un uzvārdu (juridiskajām personām – nosaukumu), deklarētās dzīvesvietas adresi (juridiskajām personām – juridisko adresi) un tālruņa numuru. Marķējumam jābūt nolasāmam, neizmantojot papildu iekārtas vai instrumentus" (Ministru kabineta noteikumi Nr. 368, 2019), bet atbilstoši Regulas ES 2019/947 (Komisijas Īstenošanas regula, ES 2019/947) prasībām šāds nosacījums vairs nav spēkā no 2021. gada 1. janvāra. Tagad ir noteikts, ka bezpilota gaisa kuģis ir jāmarķē ar ekspluatanta numuru (Par aviāciju, 1994).

Nacionālajā gaisa satiksmes nozares regulējumā ir vairāki Ministru kabineta normatīvie akti: Ministru kabineta noteikumi Nr. 26 "Gaisa telpas pārvaldības kārtība, gaisa telpas struktūra un tās mainīšanas kārtība", Ministru kabineta noteikumi Nr. 634 "Ziņošanas kārtība par atgadījumiem civilajā aviācijā" un Ministru kabineta noteikumi Nr. 487 "Aeronavigācijas informācijas sagatavošanas un izplatīšanas kārtība".

Kopš 2021. gada vasaras spēkā ir vairāki jauni Ministru kabineta noteikumi, kuros detalizētāk izskaidrots par katru bezpilota gaisa kuģu sfēru saistībā ar Eiropas regulu kontekstu.

Šie Ministru kabineta noteikumi reglamentē:

- atzīto struktūru statusa iegūšanas un uzraudzības kārtību;
- bezpilota gaisa kuģu lidojumu noteikumus;
- noteikumus par civiltiesiskās atbildības obligāto apdrošināšanu bezpilota gaisa kuģu lidojumiem;
- bezpilota gaisa kuģu, bezpilota gaisa kuģu sistēmu ekspluatantu, tālvadības pilotu un gaisa kuģu modeļu klubu un apvienību reģistra noteikumus;
- specifiskās kategorijas bezpilota gaisa kuģu sistēmu ekspluatantu sertifikācijas un uzraudzības kārtību;
- tālvadības pilotu kvalifikācijas noteikumus;
- kārtību, kādā tiek veikti lidojumi ar atsaitē piestiprinātu gaisa balonu, gaisa pūķi, bezpilota raķeti un raķešu modeļiem;
- bezpilota gaisa kuģu lidojumus gaisa kuģu modeļu klubu vai apvienību ietvaros.

Domājams, ka turpmāk noteikumos būs detalizētāk izskaidrota un definēta katra joma, jo iepriekšējos Ministru kabineta noteikumos Nr. 368 to skaidrojums bija ļoti virspusējs.

Bezpilota gaisa kuģu pilotam nepieciešamās zināšanas

Primārā, protams, ir katra bezpilota gaisa kuģa pilota prasme profesionāli vadīt bezpilota gaisa kuģi un pārzināt visas funkcijas un veiktspēju, lai sekmīgi pildītu savu misiju, tomēr, lai pilnvērtīgi veiktu lidojumus, ir jāpārzina vēl arī citi jautājumi, lai nepieciešamības gadījumā spētu orientēties un rīkoties atbilstīgi situācijai.

Pilotam būtu vajadzīgas pirmās palīdzības sniegšanas pamatzināšanas, lai negadījumā cietušajām personām varētu sniegt pirmo neatliekamo palīdzību. Jāuzsver, ka bezpilota gaisa kuģis ir diezgan bīstams tehniskais līdzeklis un atkarībā no gabarītiem tas var radīt nopietnus bojājumus gan dažādiem objektiem, gan dzīvām būtnēm, arī cilvēkiem. Bojājumi var rasties, ietriecoties kādā objektā vai saskaroties ar rotoru spārniem. Arī pašam pilotam ir liels risks gūt traumu, jo jākoncentrējas uz pašu gaisa kuģi, taču pārvietojoties var zaudēt uzmanību un gūt traumu, piemēram, aizķerties aiz kāda šķēršļa.

Praksē bieži tā negadās, tomēr iespējams, ka bezpilota gaisa kuģis var izraisīt ugunsgrēku pašaizdegšanās dēļ vai saduroties ar kādu objektu. Tāpēc pilotam ir jāprot rīkoties ar ugunsdzēšamo aparātu. Savukārt, ja bezpilota gaisa kuģis ir aprīkots ar litija polimēru

akumulatoriem, pilotam jāzina ne tikai tradicionālās dzēšanas metodes, bet arī tas, ka litijs bīstami reaģē ar ūdeni un ogļskābās gāzes ugunsdzēšamie aparāti šajā gadījumā nebūs efektīvi, jo litija degšanai nav nepieciešams skābeklis. Tāpēc tiem jāļauj izdegt, nepieļaujot tālāku uguns izplatīšanos.

Plānojot lidojumus, pilotam vienmēr jāņem vērā laika apstākļi. To dēļ bieži lidojumi ir jāatceļ vai jāpārplāno lidojuma laiks, jo stipra vēja vai lietus laikā lidot nav droši. Laikus ir jāizpēta meteoroloģiskie apstākļi un jāpārzina paša gaisa kuģa veiktspēja, lai zinātu, cik stiprā vējā gaisa kuģis ir spējīgs lidot. Arī ultravioletais starojums ir jāņem vērā – ja tā līmenis ir augsts, nebūtu vēlams lidot, jo tas var ietekmēt savienojumu starp tālvadības ierīci un pašu bezpilota gaisa kuģi. Parasti ražotājs nosaka temperatūras amplitūdu, kurā ir veicami lidojumi. Tāpēc, ja ir nepieciešamība veikt lidojumus ļoti augstā vai zemā temperatūrā, jārīkojas pēc ražotāja ieteikumiem, kas ir atrodami rokasgrāmatā. Strauju laika apstākļu maiņas, piemēram, stipra lietus, puteņa, krusas u. c. nokrišņu, gadījumā vai paātrinoties vējam lidojums būtu nekavējoties jāpārtrauc. Arī personiskajā pieredzē ir bijuši gadījumi, ka nākas pārtraukt lidojumu, jo mainās laika apstākļi – skaidrā dienā uznāk negaiss, kurš turpinās dažas minūtes, bet uz šo laiku lidojums ir jāpārtrauc.

Cilvēka veiktspēja arī ir ļoti nozīmīgs faktors. Pilotam pašam ir jāizvērtē sava pašsajūta, un pārgalvība nebūtu pieļaujama, lai pilnvērtīgi veiktu lidojumu. Noteikumos ir paredzēts, ka lidojuma laikā ir jābūt arī novērotājam, kurš palīdz pilotam, informējot par apdraudējumiem vai šķēršļiem gan uz zemes, gan gaisā. Nepieciešamības gadījumā lidojuma novērotājam ir jāspēj pārņemt bezpilota gaisa kuģa vadība un to nosēdināt, respektīvi, arī novērotājam ir jāpārzina gaisa kuģa tehniskie parametri. Pārgalvība un savu spēju pārvērtēšana ir nevietā bezpilota gaisa kuģu lidojumu izpildes gaitā, tā var radīt nopietnas sekas.

Tikpat svarīgi ir pārzināt bezpilota gaisa kuģa veiktspēju, jo atkarībā no ražotāja un modeļa tā var mainīties. Paštaisītiem bezpilota gaisa kuģiem to zināt ir vēl būtiskāk – pašam būvētājam ir jāpārzina, kādi materiāli tika izmantoti un kāda ir bezpilota gaisa kuģa veiktspēja. Arī tālvadības ierīcē ir vairāki uzstādījumi, kuri, tos sekmīgi izmantojot, spēj atvieglot pilotam darbu, bet tieši pretēju efektu var dot, ja pilots nepārzina tālvadības pults funkcijas, piemēram, funkciju, kas uztver šķēršļus un pat izvairās no tiem (ja bezpilota gaisa kuģis ir aprīkots ar sensoriem). Arī kameras funkcijas ir būtiski pārzināt, jo tās ietekmē iegūtā videomateriāla vai attēla kvalitāti, īpaši tad, ja bezpilota gaisa kuģis ir aprīkots ar termālo kameru.

Ja lidojumi ir plānoti, tad pilotam laikus ir jāizpēta dažādas kartes, lai orientētos ģeogrāfiskajā izvietojumā un identificētu šķēršļus. Patlaban aktuālākā tīmekļa vietne, kurā ir atspoguļotas visas aizliegtās un atļautās lidojuma zonas, ir www.airspace.lv/drones. Šajā vietnē ir iezīmēti visi objekti un lidlauki, kuru tuvumā ir aizliegts lidot. Jāpiebilst, ka šī karte regulāri tiek papildināta, un pirms katra lidojuma pilotam ir jāpārliecinās, vai nav veiktas izmaiņas. Dažkārt kāda gaisa telpas daļa tiek rezervēta uz konkrētu laiku (piemēram, militāro mācību laikā). Neplānotu lidojumu gadījumā, kas saistīti galvenokārt ar tiesībsargājošo iestāžu darbu, ir daudz sarežģītāk orientēties ģeogrāfiskajā izvietojumā,

jo pilotam ātri jāspēj izvērtēt, vai lidojumi ir atļauti konkrētajā zonā, vai nav būtisku šķēršļu (augstu koku, elektrolīniju, augstu ēku u. tml.). Jāuzsver, ka šādas problēmas rodas tieši operatīvās darbības pasākumu laikā, kad jāspēj operatīvi orientēties situācijā, īpaši tad, ja apkārtējā vide ir sveša un interesējošais objekts atrodas nezināmā vietā. Vieglāk savus uzdevumus ir veikt kārtības policijai, piemēram, satiksmes uzraudzības jomā vai masu pasākumu laikā, jo tai lidojuma vieta ir zināma iepriekš un var izplānot lidojumu, kā arī platformu, no kuras tiek veikta pacelšanās.

Valsts bezpilota gaisa kuģa lidojumi

Ministru kabineta noteikumos un likumā "Par aviāciju" (Par aviāciju, 1994) ir noteikta valsts bezpilota gaisa kuģu izmantošanas kārtība. Šā likuma 117.[8] pantā noteikts:

> "Veicot lidojumus ar valsts bezpilota gaisa kuģi, ievēro šā likuma, uz tā pamata izdoto Ministru kabineta noteikumu un Eiropas Savienības tiesību aktu prasības bezpilota gaisa kuģu lidojumu veikšanai.
>
> Valsts bezpilota gaisa kuģu lidojumu laikā var neievērot šā likuma prasības, ciktāl to paredz attiecīgo jomu regulējošās speciālās tiesību normas. Šajā gadījumā bezpilota gaisa kuģu sistēmu ekspluatantam ir pienākums nodrošināt ar šo likumu, uz tā pamata izdotajiem Ministru kabineta noteikumiem un Eiropas Savienības tiesību aktiem salīdzināmu lidojuma drošuma un drošības, kā arī uzraudzības līmeni.
>
> Šā likuma prasības netiek attiecinātas uz lidojumiem ar valsts bezpilota gaisa kuģi, kurš veic lidojumus šim nolūkam speciāli norobežotā gaisa telpā, kas izveidota saskaņā ar normatīvo aktu par gaisa telpas pārvaldības kārtību, gaisa telpas struktūru un tās mainīšanas kārtību. Šajā gadījumā bezpilota gaisa kuģu sistēmu ekspluatantam ir pienākums nodrošināt lidojuma drošumu un drošību, kā arī uzraudzību." (Par aviāciju, 1994)

No šā panta noprotams, ka valsts bezpilota gaisa kuģiem ir dotas atkāpes no vispārpieņemtajām normām, bet sīkāk nekas nav atrunāts. Tātad pilotam, pilotējot valsts bezpilota gaisa kuģi, pašam ir jāizvērtē riski un robežas, kuras tas var pārkāpt, analizējot objektīvos apstākļus.

Jaunajos Ministru kabineta noteikumos Nr. 429 "Bezpilota gaisa kuģu lidojumu noteikumi" jau daudz sīkāk ir noteiktas valsts bezpilota gaisa kuģu izmantotāju tiesības, tāpēc, domājams, vairs neradīsies domstarpības un piloti labāk varēs saprast, kurus vispārpieņemtos punktus drīkst pārkāpt. Piemēram, šāds noteikums:

> "Valsts institūcijām, veicot valsts bezpilota gaisa kuģu lidojumus, ir tiesības pieļaut šajā nodaļā [VII. Valsts bezpilota gaisa kuģu lidojumi – *red. piebilde*] minētās atkāpes. Ja valsts institūcija, kura ir tiesīga veikt valsts bezpilota gaisa kuģu lidojumus, lidojumu izpildei piesaista:citu bezpilota gaisa kuģa sistēmas ekspluatantu, kas nav valsts institūcija, kura ir tiesīga veikt valsts bezpilota gaisa kuģu lidojumus, uz to netiek attiecinātas šo noteikumu 55. un 56. punktā minētās atkāpes no regulā Nr. 2019/947 noteiktajiem ekspluatācijas noteikumiem un procedūrām; institūciju, kura ir tiesīga veikt militāro bezpilota gaisa kuģu lidojumus, militārā bezpilota gaisa kuģa lidojumi tiek veikti saskaņā ar likuma "Par aviāciju" 117.[9] pantu.

> Veicot valsts bezpilota gaisa kuģu lidojumus, bezpilota gaisa kuģis var būt bez nepieciešamā marķējuma, kā arī aktīvas un atjaunināta tiešās attālinātās identifikācijas sistēmas un vietzinīguma funkcijas vienā no šādiem gadījumiem: ja to paredz normatīvie akti, kas nosaka valsts institūciju funkcijas un uzdevumus muitas, policijas, valsts drošības, meklēšanas un glābšanas, ugunsdzēsības, civilās aizsardzības, apcietinājuma kā drošības līdzekļa un brīvības atņemšanas kā kriminālsoda izpildes nodrošināšanas, sabiedriskās kārtības pārkāpumu atklāšanas, noziedzīgu nodarījumu atklāšanas, izmeklēšanas un novēršanas, robežkontroles un krasta apsardzes jomā vai tas nepieciešams valsts drošības iestāžu funkciju un uzdevumu izpildes nodrošināšanai; ja ir cita iespēja identificēt, ka lidojums tiek veikts ar valsts bezpilota gaisa kuģi." (Bezpilota gaisa kuģu lidojumu noteikumi, 30.06.2021.)

Jāpiebilst, ka, stājoties spēkā jaunajam regulējumam, bezpilota gaisa kuģu lidojumus drīkst veikt diennakts tumšajā laikā, kas līdz šim nebija atļauts, bet valsts bezpilota gaisa kuģi to drīkst darīt bez ieslēgtām zibšņugunīm. Var secināt, ka tiks atvieglots darbs operatīvajiem dienestiem un arī operatīvās darbības pasākumu veikšana.

Bezpilota gaisa kuģu izmantošana operatīvās darbības pasākumu veikšanai

Attīstoties dažādiem tehniskajiem līdzekļiem, tehnoloģijām un to izmantošanas iespējām, tie var tikt izmantoti arī operatīvās darbības subjektu darbā. Tiesiskais regulējums operatīvajai darbībai ir noteikts Operatīvās darbības likumā (ODL). Šajā likumā ir noteikti vairāki operatīvās darbības pasākumi, kurus operatīvās darbības subjekts var realizēt atbilstoši konkrētai nepieciešamībai, lai izpildītu likuma 2. pantā (Operatīvās darbības likums, 1993) ietvertos uzdevumus, ievērojot šā likuma 4. pantā noteiktos principus. Operatīvās darbības pasākumi veicami operatīvās darbības subjekta amatpersonai tieši vai netieši. Piemēram, operatīvo novērošanu (izsekošanu) var veikt amatpersona pati vai attiecīgi noteiktā kārtībā uzdot to veikt valsts noteiktām ar likumu īpaši pilnvarotām valsts iestādēm jeb specializētām valsts iestādēm. Operatīvās darbības pasākumu laikā atbilstoši ODL 6. panta trešajai daļai ir atļauta arī tehnisko līdzekļu izmantošana:

> "Operatīvās darbības pasākumu gaitā var izdarīt ierakstus ar video un audio, kino un foto aparatūru, kā arī izmantot dažādas informācijas sistēmas, tehniskos, ķīmiskos un bioloģiskos līdzekļus. Šo līdzekļu izmantošana nedrīkst nodarīt kaitējumu iedzīvotāju veselībai un apkārtējai videi. To izmantošanas kārtību nosaka operatīvās darbības subjekts." (Operatīvās darbības likums, 1993)

Tehnisko līdzekļu izmantošana ir iekļauta arī Operatīvās darbības pasākumu nosaukumos, piemēram, Operatīvās darbības likuma 6. panta pirmās daļas 10. punktā (Operatīvā personas paustās vai uzglabātās informācijas satura iegūšana no tehniskajiem līdzekļiem) un Operatīvās darbības likuma 6. panta pirmās daļas 12. punktā (Operatīvā publiski nepieejamas vietas videonovērošana). Šos pasākumus nevar veikt citādi, kā tikai ar tehniskajiem līdzekļiem. Arī Operatīvās darbības likuma 6. panta pirmās daļas 11. punktā reglamentēto (Operatīvā sarunu noklausīšanās) mūsdienās veic ar tehniskajiem

līdzekļiem, protams, var būt arī izņēmums, un kādā situācijā sarunas tiek mērķtiecīgi noklausītas bez tehnisko līdzekļu izmantošanas. Tātad tehniskie līdzekļi ir ienākuši tiešu darbību izpildē un tās realizē.

Tieši tehnikas un tehnoloģiju attīstība dod arvien vairāk iespēju nokļūt situācijā, kurā tehniskie līdzekļi var aizskart ar likumu aizsargātās personu pamattiesības. Šis aspekts ir būtisks, arī izpildot mērķtiecīgus operatīvās darbības pasākumus. Operatīvās darbības likumā ir ietverti divi personu tiesību aizskāruma veidi, kas tiek vērtēti no personas pamattiesību ietekmēšanas lieluma. Tādēļ likumdevējs ir noteicis vispārējā veidā veicamos pasākumus un sevišķajā veidā veicamos pasākumus ar attiecīgi normatīvajā regulējumā noteiktu uzraudzību. Operatīvās darbības subjekta amatpersonai ir ļoti stingri jāvērtē katrs pieņemtais lēmums par kāda operatīvās darbības pasākuma veikšanu. Saistībā ar tehniskā līdzekļa – bezpilota gaisa kuģa – izmantošanu jāizsver, kā šo tehnisko līdzekli kādā no konkrētajiem operatīvās darbības pasākumiem var izmantot, tas jāaplūko gan korelācijā ar paša operatīvās darbības pasākuma veikšanas veidu, t. i., sevišķajā vai vispārējā veidā veicamu, gan ar paša bezpilota gaisa kuģa izmantošanas tiesisko regulējumu.

Izmantojot bezpilota gaisa kuģi kā tehnisko līdzekli operatīvās darbības pasākumu veikšanai, var veidoties robežsituācija starp pasākuma veikšanu vispārējā veidā vai sevišķajā veidā un bezpilota gaisa kuģa izmantošanas tiesisko regulējumu. Piemēram, veicot novērošanu (izsekošanu) vispārējā veidā, persona, pret kuru tiek veikts šis pasākums, atrodas publiski pieejamā vietā. Šajā situācijā nav problēmu ievērot noteikumu, ka bezpilota gaisa kuģi konkrētā vietā un laikā atļauts izmantot. Tomēr persona var iekļūt publiski nepieejamā vietā, un tad rodas juridiskā robeža, un pasākums vispārējā veidā ir jāpārtrauc. Konstatējot šādus apstākļus un saprotot, ka tehniski ir iespējams veikt novērošanu (izsekošanu) arī vietā, kas nav publiski pieejama, jāizvērtē situācija un operatīvā nepieciešamība, lai plānotu nākamos pasākumus jau situācijai juridiski atbilstošā veidā. Protams, rosinot veikt pasākumus sevišķajā veidā, ir ļoti rūpīgi jāvērtē personas pamattiesību aizskāruma samērība.

Vēl viens piemērs: operatīvās darbības pasākums notiek vispārējā veidā, bet kļūst skaidri saprotams, ka bezpilota gaisa kuģim, lai nodrošinātu tehnisko izpildi, jāatrodas publiski nepieejamā vietā un arī bezpilota gaisa kuģa izmantošanas noteikumi neliedz atrašanos konkrētajā laikā un vietā. Šo situāciju, domājams, jāvērtē saskaņā ar bezpilota gaisa kuģu izmantošanas tiesisko regulējumu. Ja gaisa kuģis drīkst atrasties konkrētajā vietā un laikā publiski nepieejamā vietā, tad mērķtiecīgi veicamo operatīvās darbības pasākumu, kurš vērsts uz publiski pieejamu vietu, drīkst veikt pilnā apjomā.

Cita situācija: tiek veikts operatīvās darbības pasākums – personas novērošana (izsekošana) sevišķajā veidā. Atbilstoši Operatīvās darbības likumam tiesisko ierobežojumu jeb šķēršļu šajā gadījumā faktiski nav. Ierobežojumi rodas tikai paša tehniskā līdzekļa lietošanas tiesiskā regulējuma aspektā, jo bezpilota gaisa kuģi atļauts izmantot tikai tam atļautās vietās un laikā. Piemēram, persona tiek novērota (izsekota) publiski nepieejamā vietā kādā gaisa struktūras elementā vai tā tuvumā, kurā bezpilota gaisa

kuģa izmantošana nav atļauta (piemēram, lidostas apkārtnē). Bezpilota gaisa kuģi atļauts izmantot tikai līdz zināmai robežai horizontālā un vertikālā fiziskajā robežā, kā arī var pastāvēt konkrēts laika ierobežojums.

Var secināt, ka bezpilota gaisa kuģu izmantošana operatīvās darbības pasākumos ir pietiekami sarežģīta nevis tehniskā izpildījuma ziņā, bet tieši tiesiskā regulējuma dēļ.

Asociētais profesors *Dr. iur.* Aldis Lieljuksis grāmatā "Operatīvās darbības tiesiskās un praktiskās problēmas" ir minējis, ka

> "novērošanu un izsekošanu veic tehnisko iespēju robežās, kā arī ņemot vērā atsevišķu tehnisko līdzekļu, piemēram, bezpilota lidaparātu, lietošanas normatīvos aizliegumus vai nepieciešamās atļaujas. Papildus tehniskā līdzekļa izmantošanas vispārējai kārtībai ir jāņem vērā arī tehnisko līdzekļu izmantošanas mērķi. Ja ar šo līdzekli paredzēts iekļūt (iesniegties) publiski nepieejamā vietā, nepieciešams Augstākās tiesas tiesneša akcepts" (Lieljuksis, 2021).

Šim viedoklim var piekrist vien daļēji, jo, kā jau tika minēts, operatīvās darbības pasākumu gaitu ir grūti paredzēt un situācijās, kurās būtu jānodala vispārējā veidā un sevišķajā veidā veicami pasākumi, amatpersonai būtu jāizvērtē apstākļi pēc spēkā esošā lēmuma. Grūti iedomāties situāciju, ka operatīvās darbības pasākumi tiktu veikti vispārējā veidā un nāktos pārkāpt robežu un uzsākt pasākumus, kuri tiek veikti sevišķajā veidā, – tad pilotam būtu jāraksta jauns lēmums par iespēju veikt pasākumus sevišķajā veidā, kas, protams, ir laikietilpīgi un operatīvi ne vienmēr ir iespējams.

Secinājumi

Bezpilota gaisa kuģa kā tehniskā līdzekļa izmantošanu speciālo izmeklēšanas darbību izpildē vai tehniskajā nodrošinājumā un kriminālmeklēšanas pasākumos arī ir iespējams iztirzāt līdzīgi. Speciālās izmeklēšanas darbību veikšanai ir tiesisks pamatojums izmantot tehniskos līdzekļus, un attiecīgi kādā situācijā arī jāvērtē kriminālprocesuālo normu juridiskās robežas, kuras noteiktas konkrētos procesuālajos lēmumos. Kriminālmeklēšanas pasākumos situācija šajā ziņā arī nav viennozīmīga un nepieciešama tās izpēte.

Jāpiebilst, ka bezpilota gaisa kuģa kā tehniskā līdzekļa izmantošana operatīvās darbības pasākumos prasa augstākas profesionālās zināšanas nekā citās jomās, kurās šo tehnisko līdzekli var izmantot. Bezpilota gaisa kuģa pilotam ir jāzina daudz un dažāda ar pilotēšanu saistīta specifiskā informācija, t. sk. attiecināmais bezpilota gaisa kuģu izmantošanas tiesiskais regulējums, nepieciešamas arī zināšanas un izpratne par Operatīvās darbības likuma normu darbību konkrētā vietā (tā ir būtiska operatīvās darbības subjektu pilotu profesionālā iezīme).

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Application of Expedited Procedure in Context of Ensuring Principle of Inevitability of Punishment

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Abstract

The aim of the study is to analyse Latvia's simplified forms of criminal proceedings, particularly the expedited procedure, possibilities for improving its application when evaluating ensuring the principle of inevitability of punishment.

It has been concluded in the study that the Criminal Procedure Law provides for sufficiently effective simplified forms of criminal proceedings which allow for the rapid achievement of a fair settlement of criminal legal relations. Simultaneously, practical application of these simplified forms of criminal proceedings should be improved. It is particularly important to promote interinstitutional cooperation by ensuring common understanding of the investigator and the prosecutor, their willingness to work together. The Prosecution Office should take the initiative by creating standards for the application of simplified forms of criminal proceedings, i.e. at the stage of investigation and in their further direction.

Effective application of the expedited procedure and other simplified forms of criminal proceedings serves to ensure the principle of inevitability of punishment, as well as to facilitate the exercise of the right to criminal proceedings within a reasonable time.

The study looks at Latvia's regulatory enactments and their application practices, legal literature, statistics of criminal proceedings. The study uses comparative, descriptive, deductive-inductive methods as well as methods for interpreting legislation.

Keywords: criminal proceedings, expedited procedure, principle of inevitability of punishment, simplification of criminal proceedings.

Introduction

The United Nations as one of its sustainable development goals has put forward promotion of peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable, and inclusive institutions at

all levels. This goal aims, *inter alia*, at improving the effectiveness of combatting crime, reducing violent crime, and increasing efficiency of institutions in the relevant field (Transforming our world: the 2030 Agenda for Sustainable Development, 2015). As it has been concluded by the United Nations, the predominant response to crime in countries is the criminal justice system, although the criminal justice system deals with offences after they have occurred and its role in preventing crime is less clear (World crime trends and emerging issues and responses in the field of crime prevention and criminal justice, 2017). Accordingly, in parallel with other crime prevention possibilities, such as arrangement of the urban environment, improving the economic situation, promoting educational opportunities, etc., it is necessary to further analyse possibilities of the criminal justice system in prevention of crime. In this context, effective ensuring of the principle of inevitability of punishment should be emphasised, in particular when evaluating aspects related to the immediate infliction of punishment. As it was indicated by the Italian criminologist Cesare Beccaria, certainty of a small punishment will make a stronger impression than fear of a more severe one if attended with hopes of escaping. The more immediately, after the commission of a crime a punishment is inflicted, the more just and useful it will be. The smaller the interval of time between the punishment and the crime, the stronger and more lasting the association of the two ideas of Crime and Punishment will be: so that they may be considered, one as the cause, and the other as the unavoidable and necessary effect (Beccaria, 1764). Consequently, national criminal justice system should be such as to ensure timely and proportionate infliction of punishment ensuring that the principle of inevitability of punishment is applied and serves to prevent crimes both regarding future crimes committed by a particular person or in the long term in society as a whole.

The purpose of the study is to analyse Latvia's simplified forms of criminal proceedings, particularly the expedited procedure, possibilities for improving its application when evaluating ensuring the principle of inevitability of punishment of persons.

The study looks at Latvia's regulatory enactments and their application practices, legal literature, statistics of criminal proceedings. The study uses comparative, descriptive, deductive-inductive methods as well as methods for interpreting legislation.

Criterion of Inevitability of Punishment – Timeliness of Infliction of Punishment

In accordance with Section 35 of the Criminal Law the purpose of criminal punishment, *inter alia*, is to achieve that the punished person and other persons observe law and refrain from committing criminal offences (Criminal Law, 1998). Criminal punishment provides assurance that infliction of punishment will deter the person concerned from relapse or serve as a preventive mechanism for other persons.

At the same time, not severity but inevitability of punishment is the main reason for not committing new crime, which also includes the speed of infliction of punishment. The punishment for a committed crime must be inflicted immediately so that the person is

aware what exactly he or she is punished for and for this to have an impact on the person's future decisions. It is the awareness that a crime will be followed by an immediate and appropriate punishment that prevents the person from committing a new crime.

Punishment also aims to protect public safety. Society knows that certain acts are subject to criminal liability while simultaneously expecting that the perpetrators will be found in a timely manner and held liable by law. By being capable of ensuring the rule of law, the state also enforces the general prevention and promotes public confidence in the state. According to the Chief Justice of the Supreme Court Aigars Strupišs, society loses faith in the law and the state if the principle of inevitability of punishment does not work. Society needs to see that the law works. So that no one escapes punishment (Strupišs, 2020).

Inevitability of punishment is closely linked to the speed of infliction of punishment or to the achievement of another form of fair settlement of criminal legal relations. In addition, achieving a timely fair settlement of criminal legal relations is an element of the right to justice guaranteed by Article 6 of the European Convention on Human Rights, which Latvia has to enforce in practice (European Convention on Human Rights, 1950). One of the basic principles of criminal proceedings is the right to completion of criminal proceedings within a reasonable time, i.e. without undue delay (Criminal Procedure Law, 2005). This right applies to both the person entitled to defence and the victim (Baumanis, 2018). Regarding the perpetrator, criminal proceedings should be as short as possible, since the person must receive appropriate punishment for the committed crime in accordance with the procedures specified in the law rather than be punished with lengthy criminal proceedings and coercive restrictions during that time. On the other hand, the victim should be able to achieve a fair settlement of criminal legal relations as soon as possible to restore the initial situation that existed before the crime or to receive adequate compensation (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985). It is essential that the victim be subjected as little as possible to long-term criminal proceedings which, in interaction with act or omission of other institutions involved in criminal proceedings (investigating authorities, prosecution office, court), increase risks of secondary victimisation (Handbook on justice for victims, 1999, 9).

Ensuring Inevitability of Punishment – Ability of Institutions to Ensure Fair Settlement of Criminal Legal Relations (Improvement of the Criminal Procedure Law)

Ensuring the principle of inevitability of punishment depends on the capacity of investigating authorities, the prosecution office, and the court, or on the ability to bring criminal proceedings to a fair settlement of criminal legal relations. The capacity in this case should be viewed broadly to include institutional resources, staff qualifications, work organisation, interinstitutional cooperation. Similarly, the ability of institutions to achieve a fair settlement of criminal legal relations is also clearly linked to criminal procedural

matters, simplification or complexity of investigation, enforcement of charges, the trial, how easy it is to record procedural activities, and prepare procedural decisions.

As regards the latter, it should be noted that the Criminal Procedure Law is being improved from time to time with a view to simplifying the implementation of criminal proceedings. The Criminal Procedure Law includes a number of mechanisms that make conduct of criminal proceedings more effective, including preconditions for faster record management in criminal proceedings. Examples include a prosecutor's penal order or an agreement on guilt recognition and punishment. Application of the expedited procedure also has a certain role to play in the implementation of the principle of inevitability of punishment and in ensuring the right to case examination within a reasonable time. The Criminal Procedure Law requires the person directing the proceedings to achieve a fair settlement of criminal legal relations in such criminal matters within relatively short time limits, even giving them priority (Comments to the Criminal Procedure Law, 2019).

On 20 June 2018, the Law "Amendments to the Criminal Procedure Law", which entered into force on 1 September 2018, was adopted for the purposes of implementing simplification of criminal investigation, prescribing an investigation proportionate to the severity of the crime, and strengthening the role of the principle of procedural economy in criminal proceedings. These legislative changes also simplify the recording of procedural activities, as well as review the application of simplified processes, including the expedited procedure. It is also the responsibility of the person directing the proceedings to choose the simplest form of criminal proceedings, as well as to select and take procedural actions to ensure that the purpose of criminal proceedings is achieved as quickly and economically as possible. Consequently, it should be mandatory for the person directing the proceedings to choose simplified forms of criminal proceedings under certain conditions (Vēbers, 2018).

During the investigation phase, the expedited procedure as the most important form of simplified criminal proceedings was to be mainly marked, within which the investigation should be completed and the case should be referred by the prosecutor not later than within 10 days or, in cases where an expert examination is to be carried out, no later than within 30 days from the time of initiation of the criminal proceedings. The fact that this is an important simplified form of criminal proceedings is also evidenced by criminal proceedings statistics on cases referred by the investigating authorities to the prosecution office for criminal prosecution. In 2019 and 2020, the investigating authorities referred more than 40% of all criminal proceedings initiated that year for criminal prosecution in accordance with the expedited procedure. In some State Police departments, this ratio has exceeded 60% (Information Centre of the Ministry of the Interior, 2021). This proportion is an indication of the possibility of further improvement of the expedited procedure, which could clearly become the most common type of procedure at the investigation phase.

On the other hand, in the criminal prosecution phase, the prosecutor should initially consider, for example, the possibility of using a prosecutor's penal order or termination of criminal proceedings with conditions, as these would be simpler forms of

proceedings (no court involved). However, if the prosecutor believes that the simplest form of completion of pre-trial criminal proceedings appropriate for specific circumstances is the continuation of proceedings under an expedited procedure, the prosecutor shall take a decision to refer the case to a court immediately, but not later than within 10 days. The statistics also show that, after the changes to the Criminal Procedure Law, which determined the obligation of the person directing the proceedings to choose the simplest type of proceedings, the prosecution office is completing increasingly more criminal proceedings at the level of the prosecution office having applied a prosecutor's penal order 1674 times in 2019 and 1972 times in 2020. In turn, the number of cases referred under the expedited procedure decreases significantly – 1345 in 2019, 932 in 2020 (Prosecution Office of the Republic of Latvia, 2021).

Although, for example, Professor Kristīne Strada-Rozenberga points out that the newly introduced expedited procedure is generally a mixed pattern of the forms of simplified criminal proceedings that existed in the past (short procedure in pre-trial proceedings + urgency procedure in court) with very minor modifications and very minimal innovation (Strada-Rozenberga, 2018), it should be noted that all the changes to the Criminal Procedure Law should be viewed in general. They should not be isolated from the scope of the expedited procedure, and the implemented changes to criminal proceedings generally contribute to the possibilities for applying the expedited procedure. Moreover, the proposed changes do not mean the expedited procedure as an end in itself, but rather a fair settlement of criminal legal relations in a timely manner by obliging the person directing the proceedings to choose the simplest form of proceedings, which in the prosecution phase is no longer an expedited procedure but the forms of criminal proceedings to be completed in the prosecutor's office phase (annotation of Amendments to Criminal Procedure Law, 2018). This understanding is also demonstrated by the statistics of prosecution office provided above.

It is necessary to complete investigation and criminal prosecution within a limited period of time in order to direct criminal proceedings under an expedited procedure. Consequently, it is important that the person who has committed a crime does not avoid fulfilment of his or her procedural duties, or it should be possible to ensure that the person is available. With changes to the Criminal Procedure Law, which take effect on 1 September 2018, the legislator also identified the possibility for the detained person, if they are recognised as a suspect or an accused, in order to ensure their delivery to a prosecutor or to a court for completion of criminal proceedings, the person may be in temporary detention, subject to the specified 48-hour limit from the time of actual detention (Amendments to the Criminal Procedure Law, 2018). Such a mechanism was intended to mainly work when criminal proceedings are referred to police and the suspect is referred to the prosecution office, for example, for the application of a prosecutor's penal order, and, when implementing effective cooperation between the police, prosecution office and court, the referral of criminal proceedings and the person to a court would also be possible (annotation of Amendments to Criminal Procedure Law,

2018). Therefore, there is a tool which allows for the application of coercive measures for delivery of a person to the prosecutor and court under the expedited procedure under known conditions at the beginning, thereby ensuring a fair settlement of criminal legal relations without possible delay. Of course, such a limitation of rights must be proportionate.

Ensuring Inevitability of Punishment – Ability of Institutions to Ensure Fair Settlement of Criminal Legal Relations (Improvement of Interinstitutional Cooperation)

In continuing evaluation of the capacity of the institutions, it should be noted that it means not only resources of the investigating authorities, the prosecution office and the court, but also personnel qualifications and work organisation, including the ability of these authorities to cooperate with each other. Where the number of personnel and to a certain extent qualification depend on the funding provided by the state and the qualification requirements set, then the work organisation and, in particular, cooperation shall be the direct competence of the institutions. The Criminal Procedure Law provides for such cooperation opportunities and must be implemented if the aim is to achieve a rapid fair settlement of criminal legal relations, thus also ensuring that the principle of inevitability of punishment is respected. Moreover, it is the implementation of mutual cooperation that should be a priority at the moment.

The State Audit Office also points to the need for cooperation and common understanding. As regards the question of how to reduce the overall workload of the criminal justice system, the State Audit Office indicates that it would be necessary to introduce a common understanding and practice that, in the initial phase of investigation, the investigator, together with the supervising prosecutor, shall agree on directions of investigation and reasonable limits for bringing persons to criminal liability. The State Audit Office also points out that it is essential to introduce more effectively in practice solutions already provided for in the Criminal Procedure Law for simplification, faster and more economical conduct of criminal proceedings. To this end, the Prosecution Office should first define a common understanding and the applicable practice regarding the implementation of uniform procedures (State Audit Office, 2021).

When agreeing with the findings of State Audit Office, it should be pointed out that it is not only the responsibility of each country to improve the regulatory framework but also to provide such an organisation of investigative, prosecution authorities and courts in order to create preconditions for ensuring the principle of inevitability of punishment. Quick handling of relatively simple cases and immediate calling of a person to criminal liability both reduce the sense of impunity in a particular person who committed a crime and contribute to prevention in society as a whole, and allow the resources of the investigating authorities and the prosecution office to be diverted to pre-trial investigations of more complex cases, thereby indirectly contributing to the implementation

of the principle of inevitability of punishment also in such cases. A similar conclusion has been reached by Professor Sandra Kaija, saying that application of the law in practice is also an important criterion, particularly whether the enforcement of the law has been effective in preventing individuals from committing crimes, and in case of a crime that has already happened, by applying the norms of the Criminal Law achieving a fair settlement of criminal legal relations without unjustified interference in the life of a person (Kaija, 2017).

In the light of the above, the person directing the proceedings should also choose in practice the simplest form of criminal proceedings, while avoiding unjustified interference in the life of a person and unjustified costs. The person directing the proceedings must not only carry out an effective investigation but also be able to cooperate with the person directing the next phase of criminal proceedings, the investigator should cooperate with the prosecutor, the prosecutor should cooperate with the judge to arrive at the possibility of completing criminal proceedings within very limited time frames. Effective cooperation is particularly important in cases where the investigator chooses to bring the person to the prosecutor and possibly further to the court while the person is detained. Simultaneously, given the role of the prosecutor in criminal proceedings, the initiative of the prosecution office is important by developing uniform guidelines, establishing a common understanding of the application of legal provisions, and actively engaging in criminal proceedings in their initial phase.

It is as a result of effective interinstitutional cooperation in countries such as Estonia, the Czech Republic, the Netherlands that can bring a person, while being detained, to the competent person directing the proceedings for the application of criminal penalty. In Estonia, Lithuania and the Czech Republic, a person is taken to the court, in the Netherlands to the prosecution office for the application of the prosecutor's penal order within 48 or 72 hours. Consequently, there are examples of legal provisions and effective cooperation which ensure that criminal punishment is inflicted within a few hours or within a few days at the latest. (Vēbers, Stulpāns, 2015).

As already mentioned, changes have also been made to the Criminal Procedure Law in Latvia, which allows the suspected person to be detained for up to 48 hours in order to be delivered to the prosecutor for completion of criminal proceedings. At the same time, the number of cases of practical application of this provision is still not considered numerous. It is reasonable to state that the application of detention for the expedited completion of criminal proceedings should not be an end in itself, while if the person who committed a crime has been detained in accordance with the conditions laid down in Section 264 of the Criminal Procedure Law (Criminal Procedure Law, 2005), such an option should be used for the timely fair settlement of criminal legal relations.

In order to improve the application of this provision in practice, the prosecutor supervising criminal proceedings must be appointed without delay. There must not be a situation where the time period of 24 hours specified in Section 372 of the Criminal Procedure Law for notification of the commencement of criminal proceedings and

the period of 24 hours for appointment of a supervising prosecutor after receipt of such information (Criminal Procedure Law, 2005) are used to the maximum extent. The investigator must have clear guidelines laid down by the prosecution office in which situations it is appropriate to try to complete criminal proceedings within 48 hours. In addition to a sufficient amount of evidence, there must be assurance that one of the simplified forms of completion of the proceedings at the level of the prosecution office (prosecutor's penal order, termination of criminal proceedings under conditions) can be applied to the person or that the case should be referred to a court. In particular, the investigator should detect whether the person would agree to the application of a simplified form of criminal proceedings. Is it self-evident that the person who has committed a crime should have the right to a fair trial, including the right to defence and the right to use the language that this person knows. The investigating authority, the prosecution office and the court must be able to ensure that these rights are exercised within a limited time span, or if it is unable to do so, the possibility of completing criminal proceedings within 48 hours should be dismissed while continuing to proceed as far as possible with the expedited procedure.

Consequently, the emphasis should now be placed directly on the development of law enforcement practices resolving capacity issues such as personnel qualifications, work organisation at the institution and interinstitutional cooperation. Common understanding and effective cooperation between the investigator and the supervising prosecutor would play a particularly important role here, which would be promoted by the guidelines developed under the leadership of the prosecution office.

As it can be seen from the above statistics, it is possible to achieve the use of expedited procedure at the stage of investigation in the criminal proceedings initiated in the respective year and referred to criminal prosecution in more than 60% of cases. Nevertheless, the prosecutor has been given a very extensive palette of simplified forms of criminal proceedings, which makes it possible to achieve a rapid fair settlement of criminal legal relations.

Conclusions

The Criminal Procedure Law provides for sufficiently effective simplified forms of criminal proceedings, including the expedited procedure, which allows for the rapid achievement of a fair settlement of criminal legal relations. At the same time, it has been concluded that practical application of these simplified forms of criminal proceedings is different, mainly influenced by the capacity of the institutions – personnel resources, their qualifications and interinstitutional cooperation.

Currently, it is particularly important to promote interinstitutional cooperation by ensuring a common understanding of the investigator and the prosecutor, their willingness to work together to enable a rapid fair settlement of criminal legal relations. The Prosecution Office should take the initiative by creating standards for the application

of simplified forms of criminal proceedings, i.e. at the stage of investigation and in their further direction.

Effective application of the expedited procedure and other simplified forms of criminal proceedings serves to ensure the principle of inevitability of punishment, as well as to facilitate the exercise of the right to criminal proceedings within a reasonable time, both in specific criminal proceedings and in general, as it ensures savings of the resources of investigative authorities, the prosecution office, when investigating simpler crimes, thereby enabling more effective investigation of other more complex crimes, thereby indirectly contributing to the implementation of the principle of inevitability of punishment also in these complex cases.

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Whether Sports Liability is an Independent Type of Legal Liability

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Abstract

Sport law as a highly developed complex branch of law regulates legal relations related to the subject of the different branches of law. Liability for violation of rights, non-performance or improper performance of duties is the basis of criminal, administrative, disciplinary and civil liability. However, there is another type of liability and sanctions provided for violation of sport rules. Nevertheless, no commonly accepted opinion has still been formed whether sports liability is a new type of legal liability or not.

Therefore, the aim of the research paper, through general scientific methods (monographic method, analytical method, historical method, comparative method, induction deduction) and methods of interpreting legal norms (grammatical, historical, teleological and systemic methods) is to determine the concept and content of sport liability. To reach the proposed aim, the authors of the study have formulated the concept and signs of sports liability, determined the types of a sports offense, analysed non-standard cases that outside the sports industry would not be subject to any liability and have identified main types of sports sanctions.

Keywords: disqualification, liability in sports, rules of sports, sports liability.

Introduction

Every type of sports has its own rules. Whether it is basketball, ice-hockey, badminton, football or rhythmic gymnastics. If there are rules of the game and rules for its conduct, there should be necessarily sanctions for violation of these rules. Such a "norm-sanction" system is quite common, a system that operates everywhere in society, whether it is a legal norm or a corporate one (Hall, 1961). Without sanctions, the mechanism of compliance with the rules is questioned, it becomes unviable (Schauer, 2010).

Simultaneously, along with quite clear and well self-regulated system, the industry of sports has shown the world a number of negative aspects. Sometimes excessive commercialisation and politicisation of the industry has led to a situation where the main Olympic creed "The important thing in the Olympic Games is not to win, but to take part; the important thing in Life is not triumph, but the struggle; the essential thing is not to have conquered but to have fought well" (The Olympic motto, n.d.) is often replaced by the motto "Victory at all cost!" (Cox, 2000). Among the common problems of modern sports, which lead to the replacement of mottos, are use of drugs and methods (doping) prohibited in sports, match-fixing, diverse betting fraud, profiteering with admission tickets, hooliganisms (especially in football), an increase in sports injuries, etc.

Therefore, to prevent the breach of not only the state laws, but internal national and international sports documents as well and promote the Olympic creed, a new type of liability – sports liability – was introduced in the sports industry. However, there is still no commonly accepted opinion whether sports liability is a new type of legal liability.

Therefore, the aim of the research paper, through general scientific methods (monographic method, analytical method, historical method, comparative method, induction deduction) and methods of interpreting legal norms (grammatical, historical, teleological and systemic methods) is to determine the concept and content of sport liability. To reach the proposed aim, the authors of the study have formulated the concept and signs of sports liability, determined the types of a sports offense, analysed non-standard cases that outside the sports industry would not be subject to any liability and have identified main types of sports sanctions.

1 Sports Liability: Concept and Signs

Sports industry as a self-regulated industry (Foster, 2012) has its own system of liability which is designed to ensure compliance with the rules established for all parties of sports relations (organisers of competitions, athletes, coaches, referees, etc.). Any type of sport has its own set of rules (Cambridge dictionary, n.d.). These rules are recognised to ensure fairness and impartiality of sporting events. Consequently, it can be argued that sports liability originates precisely from the rules of sports. Apart from the rules of

the game, in almost every sport, as it develops, there are certain rules of conduct that regulate activities of sports parties outside the sports field. Such rules may regulate, in particular, the order of transition of athletes, registration for participation in competitions, preparation of sports facilities for competitions, conditions for ensuring public order in the venues of sports competitions, observance of social/moral character of the athlete, etc. All of these rules require establishment of liability for non-observance, otherwise they simply will not be respected.

In accordance to theory of law, legal liability is the imposition of coercion by the state on offenders for an offense of a personal, material or organisational nature. The basis of legal liability is the fact of law infringement. Depending on the field of law infringed, a number of types of legal liability has been distinguished. Mainly there are four types of legal liability: civil, criminal, administrative and corporate.

Based on the signs of legal liability (Baikovs & Zariņš, 2012), it can be concluded that sports liability is not a legal liability since it does not rely on state coercion and the offender of sporting rules is not punished on behalf of the state.

Most researchers agree that sports liability could be a kind of corporate liability as it follows mainly from the norms contained in the rules for the conduct of sporting events, which in turn are developed and adopted by public sports organisations (Amirov, 2010). The National Collegiate Athletic Association (NCAA) in North America is an illustrative example of a sports body with vast regulatory powers and detailed rules of conduct often being criticised for bureaucracy in the name of amateurism. In serving as the regulatory body for intercollegiate athletic programmes, the NCAA establishes and enforces rules governing virtually every aspect of student-athlete experience and administration of intercollegiate athletics. These rules involve, often-times in excruciating detail, regulations concerning, *inter alia*, initial and continuing academic eligibility, recruitment of prospective student-athletes, financial aid and athletic scholarships, play and practice limits, bans on receipt of extra-benefits, and standards for amateurism. Due to its role in regulating intercollegiate athletics, the NCAA experiences its share of legal challenges. Each member institution is responsible for ensuring compliance with NCAA regulations and for self-reporting violations to the NCAA. Despite the rule entrusting competitors to self-report violations, the membership has, not surprisingly, provided for a formal process charging the professional enforcement staff within the NCAA to formally investigate allegations of rule violations and enforce liability for non-observance (Weston, 2011).

Despite this, the authors share the opinion of another group of scientists (Gardiner et al., 2005) and consider that sports liability is an independent type of legal liability.

Firstly, sports law contains special types of sanctions that are provided in the official documents of Sports Organisations and are recognised by the parties of international relations: disqualification of players, removal of judges, and others. For that reason, it might be concluded that there is specific, separate, new type of legal liability – sports

liability, as there are sanctions, that are recognised by states and are not covered by standard types of legal liability.

Secondly, the signs of sports liability are similar to the signs of legal liability (Panagiotopoulos, 2014):

1) it is provided by regulatory documents of sports federations and is of a delegated nature, i.e. in most countries the legislator establishes in national legal acts the possibility of establishing and applying sports sanctions by sports federations;
2) it occurs for the commission of offenses in the field of physical culture and sports, established by the rules of sport and regulatory documents of the sports federations;
3) it is based not on state coercion, but on recognition by the parties of sports relations of the possibility of sports federations to apply sports sanctions to them, i.e. sports liability depends on the fact of voluntary recognition – as long as the party is a participant of sports competitions and recognises the norms of the particular sports federation, they can be brought to sports liability;
4) it is expressed in certain unfavourable consequences for the offender, which are also established by sports federations, while such unfavourable consequences, as a rule, are associated with participation in sports competitions;
5) it is imposed and implemented in the procedural form established by the regulatory documents of the sports federation;
6) the offender is punished not on behalf of the state, but on behalf of the sports federation which established the norm that was violated.

Therefore, it is possible to formulate a definition of sports liability – it is application of coercive measures by a sports federation to a person who recognises norms approved by such sports federation for committing sports related offenses.

The authors believe that lack of common opinion is due to the fact that application of such sanctions is still not a measure of state coercion: sanctions for violation of sports rules are not contained in legislative acts. Therefore, the authors consider that the problem under consideration is caused by imperfection of sports related legislation.

2 Types of Sports Offenses and a Case Study

In the general theory of law, an offense is usually understood as an unlawful, guilty, punishable, socially dangerous act of a sane person that harms the interests of the state, society and citizens. A sports offense is also characterised by wrongfulness, guilt and punishment (Soek, 2006). Therefore, considering signs of sports liability stated above, a sports offense could be defined as an unlawful, guilty, punishable act in the form of action or inaction, prohibited by the rules of the sport or sporting regulations.

Types of sporting offenses may differ depending on a sport. Organisers of a competition in each sport independently determine unlawful acts, the commission of which is unacceptable and punishable. Hence, sports offenses can be grouped on several grounds:

1. According to documents prohibiting commission of a sports offense, the following types of sports offenses can be distinguished:
   a) violation of the rules of the sport;
   b) violation of sports regulations;
   c) anti-doping rule violations;
2. According to the time of committing a sporting offense:
   a) competitive, i.e. committed during the competition;
   b) out-of-competition, i.e. committed not at the time of the competition, outside the sports ground;
3. Any other violations of rules related to sports:
   a) violation of the established rules for organising a competition;
   b) violation against health of participants of the competition;
   c) violation against economic interests of the organisers of the competition etc.

Moreover, the authors would like to highlight that this is not the only possible way of grouping sports offences. For that reason, the authors will analyse two non-standard cases further that outside the sports jurisdiction would not be subject to any kind of liability, as there is no offence, apart from sports offence.

2.1 Carolina Kostner Case: a brief description of circumstances of the case

Carolina Kostner, born February 8, 1987, is an Italian figure skater. She is the 2008 World silver medalist and the 2007, 2008 European champion and the 2007–2008 and 2008–2009 Grand Prix Final Bronze Medalist (Carolina Kostner official site, n.d.).

When on 30 July, 2012, a Doping Control Officer (DCO) attempted to conduct a doping control on Kostner's then partner, Alex Schwazer (born November 26, 1984, Italian Olimpic Champion in race walking) at the premises of Kostner, she falsely advised the DCO that Schwazer was not at her house.

Kostner has since recognised that she committed a serious error of judgement by misleading the DCO, admitting the lies to DCO also accepting the fact that her conduct violated the Italian Anti-Doping Rules (Ranjan, 2015).

Schwazer tested positive for erythropoietin (EPO)[1] ahead of the London 2012 Olympics, sparking an investigation into suspected organised doping by the Public Prosecutor of Bolzano (Brown, 2014).

[1] Schwazer faced a CONI hearing on 20 November to appeal a three-and-a-half-year ban imposed by CONI in April 2013 – the outcome of that hearing is unknown. Interestingly, Schwazer's ban is nine months shorter than that proposed for Kostner. He told media that he had lied to Kostner about EPO stored in a fridge, telling her it was vitamin B12. After failing an out-of-competition test ahead of London 2012, Schwazer was removed from Italy's team and quit race-walking.

Anti-Doping Prosecutor's Office referred the athlete Kostner (affiliated with The Italian Ice Sports Federation to the Second Chamber of the National Anti-Doping Tribunal of Italian Olympic Committee (CONI) for recognition of liability upon the violation of Art. 2.8 and 3.3 of Italian Anti-Doping Rules, on the basis of the documents sent by the Public Prosecutor of Bolzano – within the inquiry called "Olimpia" and the outcome of investigations carried out by the Anti-Doping Prosecutor's Office in the field of sports, with demand for 4 years and 3 months disqualification (CONI, 2014). Article 2.8 prohibits athletes from "encouraging or helping, instigating, concealing or providing any other type of complicity with respect to any violation, or attempted violation, of the NSA". Article 3.3 allows CONI to sanction athletes for "non-cooperation on the part of any person regarding compliance with the NSA, including failure to report the circumstances relevant to the assessment of the facts of doping" (Italian Anti-Doping Regulations, 2014).

Kostner was banned to compete for 16 months.

2.2 CAS arbitration

In March, 2015, the Court of Arbitration for Sport (CAS) registered two appeals against the decision issued by the Italian National Anti-Doping Tribunal (TNA) in the case of the figure skater Carolina Kostner.

Kostner herself had appealed the decision, principally seeking its annulment and declaration that she did not commit any breach of the anti-doping rules.

The second appeal was filed by the CONI whose Anti-Doping Prosecution Office seeks to increase the period of ineligibility to two years. Two arbitration procedures were in progress and conducted by CAS in compliance with the Code of Sports related Arbitration (Kostner vs Italian Anti-Doping Tribunal, 2015).

In October, 2015, CAS issued a consent award in the disciplinary case relating to an alleged violation of the Italian Anti-Doping Rules by Kostner. The settlement agreement reached by the parties was embodied in the consent award which concluded the CAS arbitration.

Kostner was made eligible to compete as from the beginning of 2016. The parties agreed to increase the sixteen-month sanction imposed at first instance by the Italian National Anti-Doping Tribunal by five months. The resulting twenty-one-month ineligibility period was backdated to 1 April, 2014 based on procedural delays that were not attributable to Kostner. Carolina Kostner was therefore made eligible to compete from 1 January, 2016 (Kostner vs Italian Anti-Doping Tribunal, 2015).

This case received a lot of publicity in the press due to the fact that an honored athlete was banned from representing its country in the international arena for such a long period of time because of an error of judgment that mislead the DCO. The case illustrates several types of sports liability described above.

2.3 Neymar Da Silva Santos Jr Case: a brief description of the circumstances of the case

Neymar da Silva Santos, Jr. (Neymar), born February 5, 1992, is a Brazilian football player who is one of the most prolific scorers in football history. In June 2013, Neymar signed a five-year contract with FC Barcelona in exchange for €57 million one of the most expensive football transfers in history.

In August 2017, he engineered a departure to the French club Paris Saint Germain (PSG) for a then record €222 million transfer fee. Neymar also became the highest-paid player in the world, with a €45 million annual salary (Rollin, 2018).

As stated in the decision of CAS in Paris Saint-Germain & Neymar Da Silva Santos Junior vs Union des Associations Européennes de Football (UEFA), Paris Saint Germain (PSG) is a successful French football club associated to the French Football Federation. French Football Federation is associated to Union des Associations Européennes de Football (UEFA).

In 6 March, 2019, PSG played at its own stadium against FC Manchester United. The match was the second leg of the UEFA Champions League round of 16 fixture (the Match). PSG had won the first leg on 12 February, 2019 by two goals to nil.

Neymar did not participate in the Match due to an ankle injury. He attended the Match as a spectator, watching from a part of the stadium reserved for player and team officials.

In the first half of the Match Manchester United scored a goal in the second minute. PSG scored the second goal in the twelfth minute, making the aggregate score 3-1 in favour of PSG. In the thirtieth minute, Manchester United scored again making the aggregate score 3-2 in favour of PSG. In the first minute of the added time in the second half, Diogo Dalot from Manchester United took a shot at PSG's goal. The shot was blocked by one of the PSG's players, Presnel Kimpembe. The referee signaled for a corner kick to Manchester United. A few seconds later, however, the referee halted the play and indicated that he had been contacted by the Video Assistant Referees ("VAR") who had recommended that he review the video footage of the blocked shot. The referee reviewed the footage on the pitch-screen for about 60 seconds. After concluding his review, the referee awarded a penalty to Manchester United. Some of the players of the PSG remonstrated with the referee and there was a clash between some of the PSG's and Manchester United's players. The penalty was converted by Manchester United resulting in an aggregate score of 3-3. In view of Manchester United's three away goals vis-àvis the Club's two away goals scored in the first leg, Manchester United proceeded to the next round of the competition whereas the PSG was eliminated from the tournament.

Shortly after the Match, Neymar posted an image of the blocked shot to his Instagram story accompanied by the following statement in Portuguese ("the Statements"):

> "Isso é uma vergonha!! Ainda colocam 4 caras que não entendem de futebol pra ficar olhando lance em camera lenta … Isso não existe!!! Como o cara vai colocar a mão de costas? Ah vá pá pqp."

Neymar's post on Instagram immediately was widely recognized, reported and commented on by the international press. Neymar had approx. 110 million followers on Instagram and a posted story was seen by 20 % of his followers, constituting for more than 20 million people. At the post-Match press conference, e.g., the coach of PSG was promptly asked about the Statements. He responded as follows:

> "Sometimes when you remember yourself in a big, big fight and being very emotional sometimes you use words and you react in a way that you take back some hours later […] so don't be too harsh on him. I would not over-interpret the use of his words in the heat of the challenge and the moment of the decision. It is quickly typed into a smartphone […]."

2.4 The Proceedings within UEFA

On 13 March, 2019, the UEFA Ethics and Disciplinary Inspector (EDI) initiated a disciplinary investigation with regard to Neymar's Statements. On 14 March, 2019, the EDI notified Neymar and PSG of the investigation. The Appellants were invited to state their position in the matter.

PSG and Neymar submit that the Statements translate as follows:

> "It's a disgrace!! They've actually put four guys who do not know anything about football to just stand and watch the kick in slow motion … Are they for real?!! How is the guy going to put his hand on his back? Oh, for [God's] OR [f**k's] sake!"

UEFA submits the following translation for the Statements:

> "This is a disgrace!! They put four guys who know nothing about football to watch the incident in slow motion … It can't be!!! How can he handle the ball when his back's turned? Oh, go f**k yourselves!"

On 22 March, 2019, UEFA informed PSG that disciplinary proceedings had been initiated in accordance with Article 55[2] of the UEFA Disciplinary Regulations (DR).

On 25 April, 2019, the UEFA Control, Ethics and Disciplinary Body (CEDB) took a decision whereby it ruled to suspend the PSG player Neymar for three UEFA competition matches for which he would be otherwise eligible, for insulting match officials.

PSG and Neymar filed an appeal against the decision of the CEDB with the UEFA Appeals Body but it was rejected.

[2] The opening of the proceedings by the UEFA administration.

2.5 CAS arbitration

On 18 July, 2019, PSG and Neymar (the Appellant) filed an appeal against the UEFA (the Respondent) with CAS with respect to the Appealed Decision.

Merits of the case were as follows:

1. What is the correct translation of the Statements?
2. Is the content of the Statements sanctionable under Article 11[3] and/or Article 15[4] DR?
3. If Article 15 DR is applicable, is the content of the Statements directed towards "match officials"?
4. If the aforementioned question is answered in the affirmative, is the content of the Statements abusive within the meaning of Article 15(1) lit. b or insulting according to Article 15(1) lit. d DR?
5. Are there any mitigating/aggravating factors to be considered when imposing the correct sanction?

After interpretation of the Statements and its correct translation, the Sole Arbitrator was confirmed in his view when looking at the response to the Statements in the mass media. It appeared that the press unequivocally interpreted the expression *"Ah vá pá pqp"* in the sense of *"Go f**k yourself / yourselves"*.

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[3] Article 11 General principles of conduct
1. Member associations and clubs, as well as their players, officials and members, and all persons assigned by UEFA to exercise a function, must respect the Laws of the Game, as well as UEFA's Statutes, regulations, directives and decisions, and comply with the principles of ethical conduct, loyalty, integrity and sportsmanship.
2. For example, a breach of these principles is committed by anyone:
   a. who engages in or attempts to engage in fraud, active or passive bribery and/or corruption;
   b. whose conduct is insulting or otherwise violates the basic rules of decent conduct;
   c. who uses sporting events for manifestations of a non-sporting nature;
   d. whose conduct brings the sport of football, and UEFA in particular, into disrepute; e. who does not abide by decisions or directives of the UEFA Organs for the Administration of Justice, or decisions of the Court of Arbitration for Sport involving UEFA as a party or between at least two UEFA members associations;
   f. who does not comply with instructions given by match officials;
   g. who does not pay for tickets received from another club or national association;
   h. who culpably reports late – or not at all – for a match, or is responsible for a late kick-off;
   i. who culpably causes a match to be interrupted or abandoned, or is responsible for its interruption or abandonment;
   j. who enters a player on a match sheet who is not eligible to play.
3. Breaches of the above-mentioned principles and rules are punished by means of disciplinary measures.

[4] Article 15 Misconduct of players and officials
The following suspensions apply for competition matches: <…>
b. suspension for two competition matches or a specified period for directing abusive language at a match official; <…>
d. suspension for three competition matches or a specified period for insulting any match official; <…>

Also, the Scope of Application of Article 11 and Article 15 DR was considered, where the Sole Arbitrator stated the following:

Article 15 DR is clearly applicable to the Player's Instagram post. The Player posted the Statements onto his Instagram story while he was still in the stadium, i.e. only minutes after the end of the Match. The media picked up the Statements at a very early stage, i.e. before the press conference began. At the press conference the Club's Coach was asked to comment on the Player's Statements. Consequently, the Sole Arbitrator finds that the criterion of a close nexus between the behaviour in question and the "competition match" is fulfilled. In this context it is irrelevant that the Player was not fielded to play in the Match due to an injury. He attended the Match in the stadium, was in the official stands of the Club and in that function was bound to observe the duties of loyalty of a player within the meaning of Article 15 DR, which are duties that go beyond the obligations imposed on a mere "fan" or the "general principles of conduct" expected of a player.

What clearly tips the scale, and turns the Statements into a breach of Article 15(1) lit. b DR is the final sentence ("Ah vá …"). Such an outburst is absolutely inacceptable, independently of the circumstances of the individual case, i.e. the emotions involved, the significance and scope of the decision at stake and/or the questionableness of said decision.

Based on the mentioned considerations, CAS ruled that (1) the appeal filed by PSG and Neymar against the Decision of the UEFA Appeals Body dated 18 June, 2019 is partially upheld and (2) the PSG player Neymar is suspended for two UEFA competition matches for which he would be otherwise eligible (PSG & Neymar vs UEFA, 2020).

3 Sports Sanctions: Concept and Types

Previously the authors have already mentioned that in Sports industry there are specific sports related sanctions which are recognised by almost all states. Sports sanctions, such as sports liability, have not been sufficiently studied in the legal literature. In this subsection, the authors will try to formulate its definition and types.

In regards to the definition of a term "sports sanction", there is a consent between Eastern (Prokopec, 2007) and Western (Vieweg, 2004) European researchers that propose to recognise sports sanctions as a kind of corporate sanctions related to a clearly defined group of persons that make up this corporation. That means, sports sanctions are of a civil nature – a person who is part of a corporation performs a certain type of action, thus assuming all the rights and obligations that are characteristic of a member of this corporation.

Therefore, the authors consider that sports sanction could be defined as a measure of liability of party/parties of sports relationships for committing a sports offense, applied by the decision of an authorised body of the organiser of the sports competition, or by the decision of a sports judge.

Sports sanctions vary from sport to sport. Sports sanctions are usually divided into two types on the basis of time – current and subsequent (Zajcev, 2013). Current sports sanctions are sanctions imposed and enforced by a referee of a sporting event directly during the event, which do not require a jurisdictional decision to take effect (e.g. warning, free kick, etc.). Subsequent sports sanctions are sanctions imposed by specially created jurisdictional bodies of the organisers of the competition (e.g. FIFA Disciplinary Committee) which are applied not only to direct participants of the competition, but also to other parties of sports relationships (sports clubs, coaches, doctors and other specialists in the field of physical culture and sports). Subsequent sports sanctions are applied for violations committed not only during sports competitions, but also in other situations provided for by sports regulations.

As mentioned above, the types of sports sanctions, firstly, vary from sport to sport; secondly, differ in accordance to offence committed. For that reason, in order to determine possible types of sports sanction, the national or international federation disciplinary regulations have to be considered.

In accordance to Latvian Football Federations Disciplinary regulation Art. 1.5. and 1.6., in Latvia, for example, there are following sanctions that shall be applied **to natural persons**:

a) warning;
b) fine;
c) exclusion;
d) ban on changing rooms and/or reserve bench;
e) ban on being in the stadium;
f) ban on taking part in any football-related activities;
g) withdrawal of awards;
h) training for appropriate behavior;

and **for a legal person**:

a) warning;
b) fine;
c) ban on player transfers;
d) organisation of a match without spectators;
e) holding a game on a neutral pitch;
f) ban on registering new players;
g) cancellation of the game result;
h) exclusion from the competition;
i) award of loss;
j) deduction of points;
k) relegation;
l) withdrawal of prizes
m) prohibition to play in a particular stadium;
n) resumption of play (Latvian Football Federations Disciplinary regulation, 2020).

Conclusion

The authors have considered only a few aspects related to sports liability: concept and signs of a term "legal liability" and types of sports offenses and sanction. Undoubtedly, the issue of sports liability is a matter of future research.

Nevertheless, it could be already pointed out that at this moment mostly sports liability is not yet considered as a separate type of legal liability, rather a type of a corporate liability. However, the authors believe that this is a matter of time, and the solution of this issue depends directly on improvement and/or codification of sports legislation.

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Role of Foreseeability in Imposition of Civil Liability

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Abstract

The purpose of this article is to offer an insight into the role of foreseeability in imposition of civil liability. The article contains analysis of the principle of foreseeability from various points of view, for example, by analysing it from the perspective of the general (fault-based) model of liability as well of the strict liability. Likewise, the article analysis the role of foreseeability during determination of preconditions to civil liability, for example, by introducing it into the concepts of "fault" and "causation". The aspects referred to in this article are predominantly analysed from the theoretical perspective. The article references various legal sources from different countries, which allows other legal scholars to use the conclusions offered herein.

Keywords: causation, civil liability, fault, fault-based liability, foreseeability, strict liability.

Introduction

According to the general principle, liability is incurred for faulty behaviour (fault). Fault is when a person's performed activity does not conform with the required level of care either in form of negligence or intent. Herein negligence is one of the main concepts which must be analysed before concluding whether liability should be incurred for the caused damage. The main component of negligence is the test of reasonable careful person. This open-ended concept (general clause) helps to determine a standard of required care, which then is compared to the tortfeasor's conduct. If this conduct is not in line with the standard of the required care for even a little, fault will be established, which is one of the mandatory preconditions for imposition of civil liability within the framework of the general (fault-based) liability.

Important role for determination of the level of required care is reserved for foreseeability of damage, which forms an essential part of the test of reasonable careful person. Even as early as the Roman Law the *bonus pater familia*s has always been as follows: whether 1) an average Roman man, if he had been in the position of the wrongdoer, would have reasonably foreseen a possibility that his activity would cause damage to another person; 2) an average Roman man, if he had been in the position of the wrongdoer, would have performed reasonable and adequate activities to avoid such consequences; 3) the potential wrongdoer performed any such activities (Grueber, 1886). This test has withstood the test of time and can nowadays be found in many legal systems across Europe, whereby the analysis of negligence has been reduced to balancing exercise between possibility of risk, on the one hand, and required level of care (necessary preventive measures) on the other. Herein foreseeability is evaluated by identifying possibility of risk.

The general (fault-based) liability model is typically juxtaposed against the strict liability. In the framework of strict liability, liability is imposed for risk if the damage to the other person was caused while the strict liability subject was performing certain activities within the sphere of strict liability. It is generally recognised that the elements of fault (negligence; test of a reasonable careful person; required care; foreseeability etc.) herein do not play any legal role, because liability in strict liability model is imposed on the subject even if it has acted as a reasonable careful person under the given circumstances. However, the foreseeability is the key concept which demands a second look at the above statement, because it is also reasonable to claim that the general (fault-based) liability framework cannot be distinguished from the framework of strict liability. Namely, the borderline between these two frameworks is so blurry that the anomaly status of the strict liability in private law should be questioned. By analogy, the foreseeability also makes it difficult to distinguish preconditions of civil liability with scientific precision, especially regarding fault and causation. Therefore, these aspects will the analysed further in the article.

Foreseeability as Precondition of Fault

Foreseeability from Historic Perspective. In Roman law there were two criteria of negligence, which formed the test of reasonable careful person: foreseeability of damage and prevention of damage. These criteria can be clearly seen in practice in the classic example of pruning, which is provided in digest D. 9, 2, 31: if a pruner drops branches and they hit a passer-by, the pruner will be held liable if these branches were dropped in a public place without shouting a warning to the passer-by. However, this digest also references opinion of Mucius, according to which the pruner will be found liable for fault (negligence) also if the branches were dropped in a private place. Fault (negligence) is determined when what could have been foreseen by a diligent man was not foreseen, or if the warning about the impeding danger was voiced at the time it was already too late

to escape the danger. Under this reasoning distinction between public and private place is irrelevant since people often make their way across private places.

Since the pruner could reasonably foresee that dropping branches in a public place could potentially harm a passer-by (foreseeability), even more so if the passer-by was not warned upon dropping the branches (prevention criterion), the pruner is to be held liable. Moreover, Mucius argued that the foreseeability criterion would be fulfilled even if the pruning was done next to a private road, considering that in majority of cases people often make their way across private places. However, if there is no such road then the liability for fault (negligence) will not be incurred, because the pruner could not expect that somebody would pass by such place (foreseeability criterion is not fulfilled).

The opinion of Mucius is considered as the most prominent attempt to provide a definition of fault in the Roman sources, which provides good insight into an objective approach, seeing that the tortfeasor's conduct required a comparison with an abstract measurement. This seemingly general nature of Mucius' formulation has led some scholars to believe that the Roman lawyers equated fault with negligence, the failure to exercise the care of reasonable careful person, with foreseeability as its main criterion (Winiger, Karner & Oliphant, 2018).

Likewise, foreseeability was the focal point also in Paul's digest D. 9, 2, 28, in which the defendant was digging holes to catch bears and deer. In one of these holes a slave fell in and got injured. Paul claimed that the defendant is liable only if the holes were dug alongside a pedestrian road – the defendant should not be liable if holes were dug in a hunting zone, or if the slave was warned or if it could foresee the danger in any other way. Similarly, in Ulpian's digest D. 9, 2, 9, 4 liability of a javelin thrower was dependent on whether the javelin throw was performed in a training field or in a public place. Whereas, digest D. 9, 2, 11 addressed a situation where a hairdresser had set up his workplace close to an area where balls were usually thrown. While the hairdresser was shaving a slave's beard, a ball hit his hand and as a result the hairdresser cut the slave's throat. In Proculus' view the hairdresser was at fault, whereas Ulpian maintained that liability should be incurred only if the balls were thrown regularly near the area of the accident; it could also be argued that it was fault of the injured party itself if it chose to shave its beard at a hairdresser who provides its services at a dangerous place. Thus, there exists close relationship between the degree of danger and foreseeability of damage.

Foreseeability in modern private law. The Roman law criteria of foreseeability and prevention can nowadays be applied to two aspects – risk (that must be foreseen) and care (that must be exercised to prevent or mitigate the risk). Therefore, when the test of a reasonable careful person is applied, a balance between risk and care is in fact sought. Namely, the higher the risk of damage, the higher the level of foreseeability will be and consequently the higher level of care (more serious preventive measures) the person has to exercise.

Today both the common law system and Romano-Germanic legal system have recognised this method of balancing between risk and care when assessing negligence. The level of risk can be determined by a) the seriousness of the expected damage and b) the probability that an accident will happen. And the level of care can be broken down into c) the character and the benefit of the conduct and d) the burden of precautionary measures (van Dam, 2013). These levels are evaluated in a complex balancing (adjusting) exercise (Winiger, Karner & Oliphant, 2018), by keeping in mind that rights and freedoms cannot be fully warranted at the same time – full freedom to act would make society extremely dangerous, whereas full protection of rights and interests would paralyse society. It therefore follows that the criteria of foreseeability (risk) and prevention (care) that were recognised in the Roman law are presently divided into sub-criteria, though keeping the same underlying idea.

This approach can be illustrated by the *Bolton vs Stone* (1951) case, where during the game of cricket the ball was hit outside of the playing field and it hit a woman passing by. Prior to this accident, in the last 30 years the ball had been hit on the street only six times. The woman's claim was dismissed by the fact that the risk of damage was foreseeable *per se*, but this risk was so small that it did not amount to negligence. As was stated by Lord Reid: "The test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of views of safety, would have thought it right to refrain from taking steps to prevent the danger" (van Dam, 2013). When considering this example from the "four factor" standpoint, on the risk side a) the seriousness of the expected damage concerned personal injury, but b) the probability that an accident would occur was very low. Whereas, on the conduct side, c) the risk (probability and seriousness) did not outweigh the costs of precautionary measures such as erecting a high fence. Moreover, d) cricket is a useful activity, even though the character and benefit of the conduct can be a ground of justification in exceptional circumstances only (van Dam, 2013). It must be noted that the outcome was different in *Miller vs Jackson* (1977) case, which was reviewed 26 years later, where the likelihood of cricket balls being hit out of the ground was significantly higher (regardless of the 4.57 m high fence) – the plaintiffs successfully gave evidence that over the last three years in total thirteen incidents had occurred, when balls had been hit into their property, some of which chipped their brickwork, damaged their roof tiles etc. (Winiger, Karner & Oliphant, 2018).

Therefore, the risk of damage or foreseeability of damage is characterised by two criteria: a) seriousness of the expected damage; b) probability of the damage occurring. Foreseeability of damage as one of the components of negligence is envisaged also in paragraph 1 of Article 4:102 of the Principles of European Tort Law (PETL):

> "The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the *foreseeability of* the *damage*, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods."

Majority of these components of negligence had already been recognised in Roman Digest, and in fact most of them are generally still recognised in majority of legal systems across Europe (Winiger, Karner & Oliphant, 2018).

The author agrees with the suggestion that the criteria laid down in this legal norm should be followed, while simultaneously supplementing the clause of reasonable careful owner with relevant content in Latvian law (Kubilis, 2016). In Latvian civil law it is the role of foreseeability that is especially highlighted in determination of the fault of the tortfeasor (Kārkliņš, 2015). This follows from the Article 1646 of the Civil law of Latvia (CL): "Ordinary negligence shall be considered to be that lack of care and due diligence as must be observed by any reasonable careful person." Similarly, the foreseeability is also the central issue in concept of negligence in tort liability in Italian private law, since negligence in Italy is defined, amongst other things, as failure to foresee that which should have been foreseen, as well as failure to act accordingly. Likewise, foreseeability is an essential precondition that gives rise to liability in tort law of Spain (Winiger, Karner & Oliphant, 2018) and Norway, because the very first question that must be answered is how likely it is that this act leads to damage. The PETL commentary also notes that foreseeability, perhaps, is the most important and practically most appropriate factor, and this claim is also confirmed in other legal sources (Koziol, 2012).

When talking about the principle of foreseeability, its basic idea must always be stressed: the more serious the expected damage and the more likely it is that it will occur, the bigger the risk, and the higher is the ability to foresee such risk. I.e., the faster someone drives through a residential area, the more likely it is that an accident will occur, and the more serious the consequences will be (van Dam, 2013). As it relates to the above-mentioned pruning example – therein the possibility of risk is determined by the fact that the branches pruned next to a road frequently used by others, whereas the seriousness of the expected damage is determined by the potential damage to health of the passer-by, when the branches were dropped. It follows, therefore, that the pruner could have reasonably foreseen the risk of damage, which in turn necessitated implementation of relevant prevention measures (i.e., to exercise adequate care). Similar arguments regarding the risk of damage were used by the Supreme Court of the Czech Republic in a case where the plaintiff had brought a claim against the forest owner because a tree fatally fell on the plaintiff's daughter as she was riding her bicycle through the owner's forest. The owner argued that it had a limited possibility to impact the forest resources, even more so considering that the forest was partly located in a nature protection zone. The Supreme Court rejected these arguments, except for the defendants claim that it is unreasonable to hold the defendant liable for inability to be in full control of the entire forest area (i.e., to inspect each tree separately). However, under the circumstances the fatal accident happened not to a person freely moving in the woods but rather to a person riding bicycle on a forest path, where the movement of persons is usual. Moreover, the path was marked as a cycle path. In the end, the defendant was held liable for failure to inspect condition of the trees close to this path (Winiger, Karner & Oliphant, 2018).

It is essential that the degree of probability of damage is established from the perspective of the moment right before the harmful event. Namely, this level of possibility, same as the other components of negligence, must be evaluated from an *ex ante* perspective (Winiger, Karner & Oliphant, 2018). However, once a case is brought before the court and the judge has heard the facts, it may be tempting for him to look at a case with hindsight. For example, in *Haley vs London Electricity Board* (1965) a blind man had fallen into a hole on the pavement and as a result of this fall, he lost his hearing. The construction worker had marked the hole only with his hammer. The court decided that an accident to a blind person could have been expected with a reasonable degree of probability, referring to statistics showing that large numbers of unaccompanied blind people use pavements. As Lord Dunedin said: "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities" (van Dam, 2013).

In Latvian case law the risk of damage is often established in instances where "the defendant, whose commercial activity is related to provision of hotel services and housing of guests, could not be unaware of the consequences that can result from insufficient removal of ice from the territory." Similarly, the following argumentation was used in another case: "Considering that the retail shop is a public place that is being used for commercial activity and is visited by a large number of people, the defendant as the owner has to ensure that the building conforms with the requirements of construction and safety standards, and that its use does not endanger visitors." The risk of damage was also described as such: "It is a well-known fact that emergencies related to broken water pipes happen quite often, and therefore the cause of such emergency does not occur due to an exceptional extra-contractual natural event, which the defendant, who was responsible for the water pipes, could not have reasonably foreseen."

It follows from this case law that when the risk of damage is determined, the nature of the defendant's performed activity and its potential harmfulness (for example, if services are regularly provided in a dangerous way to a large number or people), as well as potential risk of damage under normal everyday circumstances (for example flooding of apartment, which is rather often occurrence), may be of importance.

When analysing the risk of damage, the harmfulness of the activity, which was indicated as a criterion in first paragraph of Article 4:102 of the ELTP, must also be taken into account. In this regard the Supreme Court of Justice in Austria reviewed a case where a soccer goal fell on a child and caused injuries. The soccer goal had initially been adequately reinforced, but over time the reinforcements were removed as the goal was often relocated. The Supreme Court decided that any person who produces or keeps a source of danger in its sphere of risk is obligated to protect other persons, as far as it is reasonable in relation to the risk. Thus, the defendant had to implement adequate security measures regarding the freely standing goal, because this source of danger was in its sphere of risk. Existing risk of damage call for an obligation to implement security measures, as long as they are reasonable. Moreover, the duty to maintain safety also applies to dangers created unlawfully and wilfully by third parties (Winiger, Karner &

Oliphant, 2018). Elaborating on this example, it is important to highlight the criterion of sphere of risk, which is one of the main components of negligence, considering that lack of adequate security measures (lack of care) can be imputed only on a person in whose sphere of risk performance of such activities or relevant risk of damage exists in the first place. This aspect is especially important in the context of omission when, contrary to active conduct, it is more difficult to identify a person to impute negligence on.

Regarding degree of danger of an activity the legal literature often quotes a phrase from *Becket vs Newalls Insultation Co Ltd* (1953): "The law expects a man a great deal more care in carrying a pound of dynamite than a pound of butter" (Winiger, Karner & Oliphant, 2018). Additionally, the degree of danger posed by an activity or thing also depends on where it is, when it is there and how long it is there for. Sometimes a situation that poses only a small element of risk at any given moment may yet be regarded as dangerous because of its long duration. As pointed out in several reports, danger is also the source of strict liability in many legal systems across Europe, or at least a source for stricter liability based on the reversal of the normal burden of proof (Winiger, Karner & Oliphant, 2018).

The CL applies strict liability to sources of increased danger (second paragraph of Article 2347). It thus follows that if an activity reaches certain degree of danger, the level of exercised care or implemented security measures by the possessor of such source will have no relevance whatsoever. Therefore, ability to distinguish a source of increased danger within meaning of Article 2347 of CL from any other source of danger is crucial, because not only relevance of evidence regarding implementation of security measures (level of care exercised) by the possessor of such source depends on this, but also what justifying circumstances will the possessor of such source be able to indicate (in this regard second paragraph of Article 2347 of CL provides an exhaustive list of circumstances that exclude liability).

Foreseeability as Precondition of Causation

Latvian legal sources note that the remoteness of damage

> "[..] describes situations where causation raises no objections in a philosophical sense, but it does cast doubt whether or not it is right to impose liability for damages, which the relevant activity had caused, but which are atypical under normal course of business or if it turns out that it was merely an initial impulse which sparkled a long chain of events which led to the incurred damages" (Torgāns, 2013).

As regards foreseeability, the author will henceforth analyse origins of the concept of remoteness of damage in common law, as well as origins of the doctrine of adequate causation in Romano-Germanic legal system.

Foreseeability and Remoteness of Damage in Contract Law. One cannot but only agree that *Hadley vs Baxendale* (1854) is a paradigmatic common law case law example within the context of remoteness of damage (Torgāns, 2013). Firstly, it is

considered as the very first case in common law where the principle of foreseeability was analysed, and, secondly, it may be the most quoted case law example when restrictions to compensation of damage are determined (McKendrick, 2010). In *Hadley vs Baxendale* the wing of the plaintiff's windmill was broken and as a result the windmill could not operate. The defendant had undertaken to take the broken wing to the manufacturer as a model; however, due to the fault of the defendant, the delivery of the wing was late and the windmill could begin to operate again much later than initially expected, thus incurring damages to the plaintiff in form of loss of profit. The court rejected the plaintiff's loss of profit claim by arguing that the defendant was not aware that failure to deliver the wing will delay operation of the windmill. According to legal doctrine, the plaintiff's claim was also rejected since the damages were not suffered as natural consequences of breach of contract, because the plaintiff could have had a replacement wing (McKendrick, 2010). From *Hadley vs Baxendale* two following components of damage remoteness test were distinguished: 1) only a naturally occurring damage is to be compensated, i.e., damage occurring under normal course of business due to contractual breach, and 2) only such damages are to be compensated which the parties had contemplated upon conclusion of the contract as possible negative consequences due to breach of contract (Stone, 1997). Some legal sources argue that these two components form a unified test of remoteness of damage, since the borderline between them is rather "smoky" (Peel, 2011).

Victoria Laundry (Windstor) Ltd vs Newman Industries Ltd (1949) is considered just as classical case law example as *Hadley vs Baxendale* (Major & Taylor, 1996; McKendrick, 2010). Here the defendant's obligation to sell and deliver a water boiler to the plaintiff was analysed. The defendant was aware that the plaintiff intended to install the boiler in its laundry as soon as possible. However, the defendant delivered the boiler five months late. The plaintiff claimed the loss of profit which resulted from the late delivery. The court satisfied the claim insofar as it was related to the loss of profit which flowed naturally from the breach of contract, because the defendant was informed only of the fact that the plaintiff needed to have the boiler on the agreed date. Whereas, the rest of the claim was rejected, because the defendant is not responsible for any loss of profit potentially resulting from exceptionally lucrative contracts, which the plaintiff had concluded with the government. The defendant was not aware of any such agreements and therefore the lucrative loss of profit was out of defendant's reasonable contemplation, i.e., these damages were not foreseeable (Voganauer & Kleinheisterkamp, 2009).

Nevertheless, broad discussions amongst legal scholars still exist regarding both mentioned case law examples regarding legal mechanisms in the context of remoteness of damage (Giliker & Beckwith, 2011), including those regarding the issue of whether the test of foreseeability is distinguishable from the test of remoteness. In any case, from the mentioned case law examples a principle can be extrapolated, according to which any damage not occurring as a consequence of natural circumstances and therefore is

unforeseeable, shall not be compensated. This is the very essence of the test of remoteness of damage in contractual law. The foundation for the test of foreseeability comes from a rationale that at the time of conclusion of the contract, the debtor cannot be considered as having subjected himself to any risks that lie beyond the limits of foreseeability (Zimmermann, 1992). Under this test, a person cannot be held liable for damages which do not emerge from the sphere of the contract, i.e., compensated are only such damages which the other party suffers under normal course of business (Peel, 2011; McKendrick, 2010). The debtor at the time of incurring an obligation has an opportunity to restrict its liability in relation to foreseeable damages, but not in relation to unforeseeable damages (von Bar & Clive, 2010). Therefore, the injured party cannot refer to some exceptionally lucrative transaction when claiming that the other party's failure to perform the contract had prevented the injured party from receiving the expected profit (Lando & Beale, 2000). It is said that the question of foreseeability usually arises only when the performance of a contract was a precondition to conclusion or performance of a subsequent contract (Torgāns, 2014).

Though partly, the principle of foreseeability can also be found in Article 1779.[1] of the CL, which prescribes that:

> "A person who causes the damages shall compensate the damages in such amount which could have been reasonably foreseen upon entering into a transaction as expected consequences of non-performance, unless such non-performance has occurred through malicious intent or gross negligence."

This provision was introduced in the CL by the 4 June 2009 amendments (in force as from 1 July 2009). The annotation of these amendments reveals that the article in question was introduced as part of measures to harmonise the CL with other European legal systems and draft unification documents.

Foreseeability and Remoteness of Damage in Tort Law. When joining contractual relationship, the parties are free to limit any unforeseeable risks. Whereas, in tort law there is no such possibility (Major & Taylor, 1996) – here the damage is caused suddenly and without prior agreement of the parties, and the injured party usually has not had the opportunity to take preventive steps that would protect its interests from this damage (Peel, 2011). On the one hand, the approach where "all damage must be compensated" is in line with the principle of effectiveness of civil liability, because otherwise the significance of compensatory and preventive nature of civil liability would be lost (Palmer & Bussani, 2009). On the other hand, it would not be fair if a person was held liable for negligence with regard to such damage which does not usually occur in relevant circumstances and therefore is not foreseeable (Torgāns, 2009). Consequently, in tort law the concept of remoteness of damage also inevitably developed. In tort law, with the help of this test of remoteness of damage, determination is made whether the relevant negative consequences are direct and immediate result of the tortfeasor's activity, whether they are accidental, and whether they are too remote (Abott & Pendlebury, 1993). The basic

idea of the test of remoteness of damage is rooted in the question of whether the sense fairness should reject claim for compensation of damage, if such damage is a consequence of a tortfeasor's activity (Giliker & Beckwith, 2011). Considering that the courts are not always willing to put too heavy burden of liability on the tortfeasor and its insurers, it is only logical that the test of remoteness of damage is pervaded by legal policy concerns (Cooke, 1995).

Similarly to contract law, notable common law tort cases exist as well. In the context of foreseeability, the most notable are *Re Polemis* and The *Wagon Mound* cases. In *Re Polemis and Furness, Withy & Co* (1921) an employee of the defendant had been loading oil container cargo into the underhold of a ship when it negligently dropped a large plank of wood. As it fell, the wood knocked against the oil cargo, which created a spark which in turn ignited the surrounding petrol fumes, ultimately resulting in the substantial destruction of the ship as well as damage to the surrounding ships. The court decided that the defendant is liable for the damages. Although the employee could not reasonably foresee that the falling plank would cause fire, the court argued that it should have foreseen that a falling wooden plank could cause "certain damage" to the ship (for example, a dent or scratch). Therefore, the defendant was held liable for all damages that were directly caused by the negligence of the employee (Giliker & Beckwith, 2011).

The court's reasoning in *Re Polemis* has been criticised as rather confusing, because it opened the door to two possible interpretations in tort law: 1) narrower interpretation – the tortfeasor is liable for all direct damage if it could have foreseen "certain type of damage" (in the above example, it would be damage to property which resulted in scratches to ship, and such type of damage must be separated from pure economic loss and personal injury); 2) wider interpretation – the tortfeasor is liable for all direct damage if it could have foreseen "any type of damage" at all. In the context of the wider interpretation, the tortfeasor would potentially be held liable also for "other type of damage", namely, for personal injury and pure economic loss, which the tortfeasor could not have foreseen as consequences of its activity. In this regard, it is only fair that *Re Polemis* is often quoted as cornerstone to the notion that "liability shall be incurred for all direct consequences" (Shapo, 2000).

The direction taken by *Re Polemis* was preserved in tort cases up until 1961 when in The *Wagon Mound No.1* (*Overseas Tankship (UK) Ltd vs Morts Dock & Engineering Co Ltd*) the court marked a turning point in the notion of "liability for all direct consequences". In this case *Wagon Mound*'s crew negligently spilled oil into the sea. The oil drifted around for certain period about 200 meters from the *Wagon Mound* ship. The oil then mixed with the cotton waste that was drifting near in the sea. In the sea melted metal was also spilled, because welding works were performed in the seaside as per usual. When the melted metal mixed with the oil and cotton waste, a sudden fire broke out and damaged the nearby ships. The court decided that only the damage caused to the seaside was foreseeable (von Bar, 2000).

As per the Judge Viscount Simonds:

> "It does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or gross, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be 'direct'. It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable [not unusual – author's note] consequences of his act. To demand more of him is too harsh a rule [..]" (Giliker & Beckwith, 2011)

This example perfectly illustrates that it is not always fair to impose civil liability for "all direct consequences". Had the court held on to the reasoning of *Re Polemis*, a conclusion would follow that the defendant could have reasonably foresee "any type of damage" to the plaintiff, and liability would be imposed for "all direct consequences". It is no wonder that The *Wagon Mound No.1* case is often cited as the "new rule in tort law" as opposed to the "old rule", which was established in *Re Polemis* (Heuston & Buckley, 1996).

A more complicated manifestation of the test of remoteness of damage can be observed in personal injury cases. For example, in *Hughes vs Lord Advocate* (1963) post office workers, while repairing cables, breached their duty of care and left an unattended manhole on the street. The manhole was covered only with a tent. In the evening, the manhole was not guarded and instead it was surrounded only by paraffin warning lamps. The injured was an 8-year-old boy who took one of the paraffin lamps and climbed down the manhole. Due to specific and unusual chemical reaction an explosion occurred in the underground tunnel causing severe burns to the boy. The court decided that the post office was liable, because it could have reasonably foreseen that "somebody could have been burned by the flame produced by the paraffin lamp". Therefore, the court concluded that it was the "damage from the fire" and not "damage from the explosion" that was the decisive factor in determination of foreseeability or type of damage (Giliker & Beckwith, 2011). Nevertheless, other legal sources explain that the post office was held liable because the fact that "some child would get into the tunnel with the paraffin lamp" was foreseeable, and therefore it could have been reasonably foreseen that the child would suffer certain burns (Cooke, 1995).

It can be concluded that it is sufficient for common law courts in personal injury cases to establish, for example, reasonably foreseeable "personal damage to health in of itself", whereas in property damage cases the courts require more specific objects of foreseeability, namely, specific types of property damage. The differences in object of foreseeability can be explained by legal policy. Firstly, the law is concerned, first and foremost, with protection of person's life and health, not property. Secondly, if, in the event of property damage, the object of foreseeability would be distinguished only as property damage as unified tortfeasor's liability risk, then the tortfeasors could be held liable for very wide variety and scale of damage (Giliker & Beckwith, 2011) resulting in the so-called "crushing liability". To give an example, a person A, while visiting a person B at his home, inadvertently pushes over a vase which was standing on a regular coffee table, and this

vase breaks into pieces. However, later it turns out that the vase was a very valuable Ming dynasty relic with very high historic value, of which a person A was unaware. In such scenario it would be unfair to impose liability to A for full value of the vase because A could not have reasonably foreseen "damage to a priceless antiquity", but instead it could merely foresee "damage to a household item". Such valuable items usually are not placed on coffee tables (Giliker & Beckwith, 2011). Moreover, in cases of property damage the approach of narrower interpretation of foreseeability object is justified by the fact that the injured party has usually insured itself against such damages (Cooke, 1995).

Foreseeability and Doctrine of Adequate Causation. The most notable example of evolution of foreseeability within the doctrine of adequate causation in Romano-Germanic legal system can be found in German contract law. It has to be taken into account that today in Romano-Germanic legal system (especially in Germany) the principle of *conditio sine qua non* serves as the basis for causation. Within this principle of *conditio sine qua non* the stated doctrine of adequate causation evolved, according to which an activity is considered as cause of damage only if it in of itself can objectively cause the resulting damage. Over time, this doctrine covered foreseeability also – in both contract and tort law.

During the early 19th century, Germany had not yet developed a reliable doctrine that would limit civil liability in cases of contractual breach. To this end, the notable German legal scholar, Nobel Prize in literature laureate, Theodor Mommsen, rejected foreseeability as too contradictory to the basic tenets of contractual law (including, to the principle of effectiveness of civil liability), although at the same time there existed contrasting views that criticised Mommsen (Zeller, 2005). In this regard, legal scholar Guenter Treitel noted that it is no surprise – the German Civil Code and its legal commentary originally did not recognise the principle of foreseeability, but instead adopted the doctrine of adequate causation (*die Adäquanztheorie*) that is so prevalent today (Brox & Walker, 2003). Over time, the German example was followed by Austria, Greece, Portugal, Slovakia, and Sweden (von Bar & Clive, 2010).

Consequently, the German legislator chose to reject limitations to compensation of damages, by arguing that in contractual relationship (especially between business entities) the party in contractual breach must compensate the caused damages in full amount (Schlechtriem, 2000), as long as these damages have causal link to breach of the relevant contract (the essence of the doctrine of adequate causation). However, this does not mean that the principle of foreseeability is not recognised in German contract law at all. For example, it must often be determined if the relevant damage was caused by breach of contract, assuming that the party in contractual breach is an experienced party (Lando & Beale, 2000). This approach is allegedly favourable to the creditor because an experienced party can foresee more than an inexperienced person in case of a contractual breach. This approach is based on the principle of fault which is a cornerstone of German contract law (von Bar & Clive, 2010).

In Germany, such model of civil liability, wherein the principle of foreseeability is rejected, has been preserved for approximately eight centuries, and is still considered as the leading doctrine therein. Nevertheless, the German contract law, in terms of the doctrine of adequate causation, draws similarities with the principle of remoteness of damage, which is recognised in common law: "the common experience of mankind"; "ordinary course of business"; application of test of a "reasonable man" – all these concepts are often invoked in characterisation of the test of remoteness of damage in common law. Consequently, German legal scholars began to cautiously relate these concepts to remoteness of damage (*weit enfernt*), which is considered as a secondary element to the doctrine of adequate causation (Schlechtriem, 2000). Legal scholar Jean Corbonnier argued that both the doctrine of adequate causation and the principle of foreseeability within the test of remoteness of damage are mutually indistinguishable concepts (Zeller, 2005). Likewise, legal scholar Bruno Zeller recognised that separation of both of these concepts has become essentially impossible, because boundaries of these doctrines have merged together (Zeller, 2005). G. Treitel has joined this proposition as well (Markesinis, Unberath & Johnston, 2006).

In 1870s, an active discussion amongst German legal scholars broke out regarding whether or not it is necessary to adopt the principle of foreseeability in the context of contractual liability, taking into account that the German courts had already begun to apply the principle of foreseeability to certain types of agreement (Schneider, 1995). The essence of these discussions was whether the outcome of application of the doctrine of adequate causation is the same as when the concept of foreseeability from the test of remoteness of damage is applied. Over time, in the context of the doctrine of adequate causation the test of "objective observer" was introduced where the said observer is placed at the time the damage is incurred (*im Zeitpunkt des Schadensereignisses*) and is informed of all factual circumstances of the case (Schlechtriem, 2000). Additionally, German legal scholar Dieter Medicus has stated that the doctrine of adequate causation is rooted in the belief of "ordinary course of business" (*im regelmäßigen Laufe der Dingen liegen*) – the same core notion that is reflected in the famous *Hadley vs Baxendale* case and many others. Furthermore, D. Medicus notes the necessity to apply the test of the "objective observer" to the tortfeasor at the time the harmful activity was performed, as well as considering the circumstances of which the tortfeasor was informed (Medicus, 1999). It can, therefore, be concluded that the German doctrine of adequate causation in fact applies the same principle of foreseeability which is used in the test of remoteness of damage in common law. The doctrine of adequate causation was adopted in German tort law as well; however, it is criticised as quite unclear (Winiger, Karner & Oliphant, 2018).

The doctrine of adequate causation as derived from the principle of *conditio sine qua non* is the leading doctrine not only in German private law, but in Latvian private law as well – both in contract law and tort law (Torgāns, Kārkliņš & Bitāns, 2017; Strazdiņš, 2017; Mantrovs, 2016).

As was put by the Latvian scholar Konstantīns Čakste:

> "Let's take an example: a random person is shouting on the street whilst a woman with a weak heart is passing by and as a result of hearing these shouts she dies from a heart attack. In this instance it can also be said that the person shouting was responsible for the death of the woman. Logically, if the woman did not have heart problems, the shouting would not have caused her death. Boundaries are needed here. In doctrine many have contemplated these boundaries. Currently the leading concept in doctrine and in practice is the so-called adequate doctrine. It states that activity or inactivity is deemed to be the cause of the damage if such damage usually follows from the said activity under relevant circumstances. For example, since death usually does not follow from shouting or uproar – the person responsible for the uproar cannot be held liable for causing death according to the adequate doctrine, because the adequate doctrine does not recognise this matter as cause of death." (Čakste, 2011)

In the doctrine of adequate causation an objective link between the activity and the resulting consequences is a crucial factor if the tortfeasor knew or at least should have known the significance of such link between the activity and its consequences (von Bar & Clive, 2010). Furthermore, as stated by the famous legal scholar Helmut Koziol, adequate or "normal" consequences are such consequences that are typical or usual to the relevant activity, and additionally it is not necessarily required that such consequences result every time (Koziol & Steininger, 2009). Whereas, an event is not an adequate cause of the damage if it could engender the damage in question only under particularly unique, improbable circumstances which would have been disregarded had events followed their usual course (von Bar & Clive, 2010).

Foreseeability in Strict Liability Model. Contrary to the general (fault-based) liability model, one's ability to foresee the damage is not taken into consideration in the strict liability model. Such proposition is explained by the fact that the purpose of the strict liability is to extend liability to those who would not be held liable under the general model of liability (Kārkliņš, 2017). The basic idea of the strict liability is rooted in a proposition that a person shall be held liable for damage regardless of whether lack of required care is determined in the activity of such person either by negligence or intent. Since none of these legal concepts are relevant in the strict liability model, it is only fair that the strict liability is sometimes referred to as the no-fault liability model or the risk liability model. However, it would be very premature to claim that in the strict liability model elements of fault, including the foreseeability, have no relevance.

Firstly, the above analysed doctrine of adequate causation is applied not only in the general (fault-based) model of liability, but also in the strict liability model. The framework of strict liability in of itself does not discard the necessity to evaluate preconditions of causation (Torgāns & Kārkliņš, 2015). As was already indicated, the doctrine of adequate causation incorporates the principle of foreseeability. It can therefore be concluded that the elements of fault have relevance in the strict liability regime as well.

Secondly, although the strict liability model is characterised by an exhaustive list of justifying circumstances that exclude liability, it is worth mentioning that it is the *force majeure* that is the most common excuse for exclusion of strict liability. Thus, for example, according to paragraph 2 of Article 2347 of the CL, the person possessing the source of increased danger will not be held liable for the damage caused if it was a consequence of *force majeure*. One of the relevant aspects in determination of *force majeure* is the person's inability to reasonably foresee the event (Vīnzarājs, 1932). Thus, another element of fault can also be recognised in the strict liability model.

It follows that challenges arise there when attempting to distinguish the general (fault-based) liability model from the strict liability model (it must be noted that there exist other considerations as well that prevent one from separating both of these models of liability; however, thorough analysis of these considerations deserve a separate article). It is argued that "requiring foreseeability for causation in cases of strict liability would let in a negligence element via the backdoor of causation", while pointing out that negligence is usually looked at from an *ex ante* and in causation from an *ex post* perspective (van Dam, 2013). The theoretical distinction between negligence and strict liability cannot be maintained and a clear distinction between the two concepts is neither useful nor feasible – these frameworks are no longer opponents but need to cooperate (van Dam, 2013).

Due to similar reasons, it is not possible to precisely distinguish the preconditions of liability – "fault" and "causation" – considering that the nature of foreseeability in both concepts, although with some certain nuances, are quite similar. It must also be considered that the causation is largely affected by the other preconditions of liability (including by the fault). It must therefore be stressed that the more negligently someone behaves, the easier the courts tend to attribute remote or unforeseeable consequences to such behaviour. Whereas, if intent is established, the tortfeasor will be liable for all consequences, regardless whether they are believable – it is sometimes said that intention to injure the plaintiff disposes any question of remoteness (Winiger, Karner & Oliphant, 2018). Likewise, the causation is influenced also by the type of damage and nature of the protected right and interest – the causation is easier to establish in personal injury cases, not in property damage cases. Furthermore, causation is also closely related to the injured party's contributory negligence. The said considerations perfectly illustrate why causation does not have a shape of its own – it is an elastic feature which can be stretched and shrunk according to the magnitude of the other requirements (van Dam, 2013).

Conclusions

1. The basic form of fault – negligence – focuses on the question of whether the possible tortfeasor has observed appropriate care in its behaviour in relation to the injured party, taking into account the risk of damage. One of the main components of the concept of negligence is the foreseeability of damage, which

was prevalent as early as the Roman law. The principle of foreseeability is relevant also in *force majeure* circumstances, thus excluding liability. Additionally, the principle of foreseeability is recognised also as a precondition of causation (specifically, it is a principle in both the test of remoteness of damage and doctrine of adequate causation). However, foreseeability as a precondition of causation is analysed only after the negligence itself is established (and the foreseeability of damage which is evaluated within its framework). Hence, in the second component of foreseeability a completely different precondition of civil liability – causation – is evaluated by determining, amongst other things, whether the caused damage by itself meets requirements of ordinary course of business. In other words, when causation is being determined, the tortfeasor's negligence is already established. This second component of foreseeability is used as a measure to adjust the amount to be compensated, since all discussions about whether the person is liable at all are over. Instead, the discussion here is about the fairness of the number of damages to be compensated.

2. Since in Latvian contract law such corrective measure is *expressis verbis* introduced in Article 1779.[1] of the CL, it follows that in Latvian contract law there exist (at least) three components of foreseeability: 1) an element of negligence (fault); 2) an element of *force majeure*; 3) an element of causation within context of remoteness of damage. In contrast to the contract law, in Latvian tort law such principle of foreseeability as a component of the test of remoteness of damage within the framework of precondition to causation has not been *expressis verbis* introduced in the CL. However, such principle of foreseeability in Latvian tort law exists through the medium of doctrine of adequate causation (the principle of foreseeability within the doctrine of adequate causation and the test of remoteness of damage (Article 1779.[1] of the CL) are almost identical concepts). Hence it can be concluded that in Latvian tort law (same as in contract law) there exist three components of foreseeability: 1) an element of negligence (fault); 2) an element of *force majeure*; 3) an element of causation within the context of the doctrine of adequate causation.
3. Foreseeability of damage as a component of negligence (fault) can be summarised as follows: the more severe the expected damage and the higher the possibility that such damage will be caused, consequently the higher is the risk that the damage will be caused and the higher is the possibility to foresee such damage. Likewise, the higher the risk of damage, the more serious preventive measures (care) must be implemented. Importantly, the degree of probability has to be established from the perspective of the moment directly before the harmful event. Namely, this level of possibility, same as the other components of negligence, have to be evaluated from an *ex ante* perspective. In the analysis of risk of damage, the degree of danger of the performed activity has to be taken into consideration as well. Finally, it is important to highlight

the sphere of risk, which is one of the most significant aspects when in determination of negligence, considering lack of security measures (lack of care) can be attributed only to somebody in whose sphere of risk the risk of damage was in the first place.

4. The principle of foreseeability is one of the main reasons for why it is impossible to precisely distinguish the general (fault-based) liability model from the strict liability model, as well as to distinguish "fault" from "causation" as preconditions of liability. The distinction between fault-based and strict liabilities is neither useful not feasible – these frameworks are no longer opponents but need to cooperate.

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Detecting Asset Misappropriation: Forensic Accounting

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Abstract

The main task of the investigation of asset misappropriation is the correct classification of a crime: identification of the fact of misappropriation and determination of the amount of misappropriated assets. Specificity of asset diversity, asset accounting requirements, and a wide range of misappropriation opportunities require specialised knowledge in accounting and economics that investigators often lack. The aim of the study is to increase the knowledge of investigators in forensic accounting in order to increase effectiveness of investigations in detecting asset misappropriation. In this article, the authors, Latvian and Lithuanian accounting experts, talk about typologies of asset misappropriation and ways to detect misappropriation. The authors have compiled a list of red flags for misappropriation of assets and proposed an algorithm for determining the shortage or surplus of assets using forensic accounting methods. Research methods include: qualitative and quantitative methods of economic science, analysis of international standards and scientific literature, and graphical analysis.

Keywords: asset misappropriation, forensic accounting, shortage, concealment typologies.

Introduction

Asset misappropriation is a form of fraud that involves theft of assets or misuse of company resources by employees, management, or third parties. According to a global study on occupational fraud and abuse carried out by the Association of Certified Fraud Examiners (2020), asset misappropriation is the most common form of fraud, occurring in 86% of cases of fraud, with an average loss of USD 100,000 per case. The most frequent victims of this crime are government and public administration (195 cases of fraud identified), manufacturing (185), and health care (149). Fraud examiners note that the average duration of detecting internal fraud by the police is 24 months, while the forensic accounting approach (document examination, account reconciliation) reduces the investigation time to 7–18 months.

Misappropriation is a criminal offence under the Criminal law in Latvia and Lithuania. Liability for such criminal offenses is provided for in Section 179 "Misappropriation" and Section 180 "Theft, Fraud, Misappropriation on a Small Scale" of the Criminal Law of the Republic of Latvia (1998); in Article 183 "Misappropriation of Property" and in Article 178 "Theft" of the Criminal Code of the Republic of Lithuania (2000). Correct identification of the shortage or surplus of the asset and its amount is also necessary in the investigation of other economic crimes: bankruptcy fraud, corruption, money laundering, tax evasion, etc. Asset misappropriation research studies are mainly related to the internal control of the company to prevent misappropriation of assets and internal and external audit capabilities to detect asset misappropriation. The study by C. Albrecht, M. Kranacher and S. Albrecht (2008) is one of the first works which presents the nature of asset misappropriation, types and schemes of misappropriation, weakness of internal control of the company, red flags of the crime, as well as procedures for prevention, detection and investigation of this type of fraud.

Importance of red flags for detecting misappropriation of assets is demonstrated in studies by R. Kassem (2014), W. Hijazi and R. Mahboub (2019). The authors analyse alerts of fraud in context with the International Standard of Auditing (ISA) 240 "The Auditor's responsibilities relating to fraud in an audit of financial statements" (International Federation of Accountants, 2009).

Finnish scholars B. Gullkvist and A. Jokipii (2013) examine perception of the importance of red flags by internal and external auditors and economic crime investigators. The study found that internal auditors pay more attention to red flags related to misappropriation of assets than to those related to fraud in financial statements. Investigators, on the other hand, take the opposite point of view, but external auditors do not see significant differences. Results of Indonesian researchers Y. Yusnaini et al. (2017) are different. Based on experiments of 92 internal auditors using Anova's one-way analysis and independent sample t-test, the researchers concluded that internal auditors can effectively detect all types of internal fraud, including asset misappropriation, without distinction. T. T. H. Le and M. D. Tran (2018) examine the effect of internal control

system on asset misappropriation in Vietnamese firms. Based on 279 questionnaires of internal auditors, accountants and department managers, using regression analysis, three components of internal control are identified that have the strongest impact on misappropriation of assets: control environment, control activities, information and communication.

Research results by Korean authors D.-B. Song et al. (2013) suggest that there is a relationship between earning management and asset misappropriation, so, negative accrual basis of accounting provides a clue to management misappropriation of assets. The study by the USA researchers D. Kip Holderness Jr. et al. (2018) found a negative correlation between recession and increased misappropriation of assets, as an opportunity (incentive) plays a larger role than financial pressure. The research was conducted in the form of an interactive simulation involving 324 business professionals in the role of a manager or CFO, based on the theory of the triangle of fraud. Research results demonstrate that asset misappropriation is less likely to be initiated during economic recessions (when pressure is high but opportunity is low) than during economic expansions (when opportunity is high but pressure is low). However, economic downturn leads to an increase in the number of asset misappropriation reports as more emphasis is placed on budgetary planning and internal control, increasing the likelihood of misappropriation. E. H. Nia and J. Said (2015) conducted a survey among employees of three top banks in Iran, involving 191 respondents, to assess nine asset misappropriation scenarios. Thus, bankers noted the most common types of misappropriation of assets: using office internet services for personal purposes, applying for new checkbooks for oneself or their close relatives without permission, and borrowing small money from a bank for personal use.

The authors did not find any scientific studies to identify misappropriation of assets in Latvia and Lithuania. Experts use specialised methods, such as, the Methodology for determining the shortage of material assets and funds of the Forensic Science Centre of the Ministry of Justice of the Republic of Lithuania (Lakis et al., 2001). In turn, standards of the International Organization for Standardization (ISO) (2012, 2017) require mandatory validation of forensic methods, which is possible through international recognition of methods in scientific environment.

This research topic is determined by incompleteness of theoretical achievements in this field and relevance of the scientific basis of forensic approach for detecting asset misappropriation.

The aim of the present study is to increase the knowledge of investigators in forensic accounting in order to increase effectiveness of investigations in detecting asset misappropriation. An additional goal of the study is international recognition of the forensic accounting method for identifying asset shortage. To achieve the goal, the following tasks have been set to examine typologies of asset misappropriation and detection approaches, and offer an algorithm for determining asset shortage using forensic accounting methods.

The research methods include the generally accepted qualitative and quantitative methods of economic science, analysis of international standards and scientific literature, and graphical analysis.

Asset Misappropriation Typologies and Accounting Features

According to the Association of Certified Fraud Examiners (ACFE), the occupational fraud is classified into three major categories: corruption, asset misappropriation, and fraudulent statements. Each of these categories is divided into further sub-categories. This complete classification of internal fraud is often referred to as the Fraud Tree. Asset misappropriation is divided into three subcategories: skimming, larceny, and fraudulent disbursements (ACFE, 2020; Kassem, 2014). Classification of asset misappropriation typologies (fraud schemes) is demonstrated in Figure 1.

Detection of misappropriation of assets must be dependent on the fraudulent schemes used to commit the crime. As observed in Figure 1, most fraudulent schemes involve accounting records in which misappropriation of assets has not occurred as a result of unconcealed larceny. Thus, in order to identify a fraudulent scheme, it is necessary to know the specifics of asset accounting.

Based on the basic principles of accounting theory, assets are divided into long-term investments and current assets. Long-term investments are assets that the company intends to hold for more than a year, such as investment properties and technological equipment. Current assets are for business use for up to one year, such as cash, inventory, etc. The full list of asset types is specified in the Law on the Annual Financial Statements and Consolidated Financial Statements ($AFSCFS_{LV}$) in Latvia (2015), and in the Law on Financial Reporting by Undertakings (FRU_{LT}) Lithuania (2001). The main difference between long-term investments and current assets is that the cost of a long-term investment, which is usually high, is gradually written off over the life of the asset rather than in full immediately as is the case with current assets. Long-term investments are stated in the balance sheet at residual value (excluding accumulated depreciation). There are other features of asset accounting. The most important features of asset accounting and requirements accordance with International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS) are presented in Table 1.

Thus, the main laws governing accounting requirements are the law On Accounting (1992) and $AFSCFS_{LV}$ (2015) in Latvia, and the Accounting Law (2001) and FRU_{LT} (2001) in Lithuania. Public sector accounting is regulated by a separate law on public sector reporting.

Summarised requirements are provided in the mentioned laws, and more detailed provisions are provided in International Accounting Standards. The most important standards are 2 "Inventories", 18 "Revenue", 16 "Property, plant and equipment", 17 "Leases", 32 "Financial instruments: presentation", 38 "Intangible assets", etc.

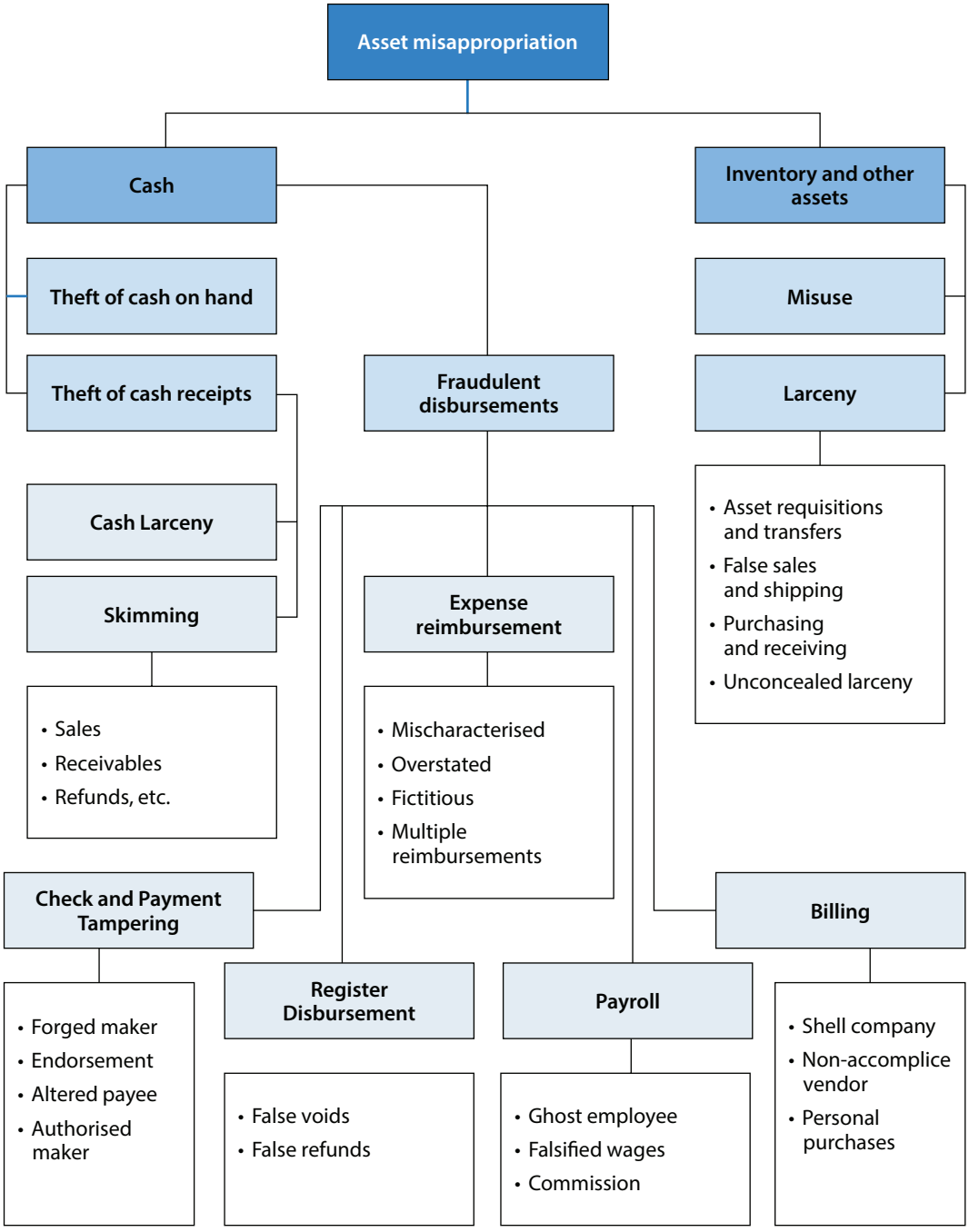

Figure 1. Classification of asset misappropriation typologies (created by the authors based on ACFE, 2020)

Table 1. Features of asset accounting*

Type of asset	Specific of accounting	Standards, law
Long-term investments		
Intangible investments	Intangible investments are identifiable non-monetary asset without physical substance and meet the following classification criteria: they can be separated from the company and sold, transferred, licensed, leased or exchanged under a contract or other right, and the company intends to use them for more than a year and expects economic benefits from these cases. Typical elements are goodwill, development costs, concessions, patents, licenses, trademarks and similar.	IAS No 38
Fixed assets	Movable or immovable tangible property used by the company for business purposes for a longer period of one year. The initial amount of fixed assets is determined by reference to its acquisition cost or production cost or, in special cases, its fair value. Fixed assets are presented in the balance sheet at net value, except for land plots, for which depreciation is not calculated. The value of the asset in the balance sheet depends on the chosen period of use. A revaluation method may be used to measure fixed assets. Leased assets are recognised in the balance sheet only if they are finance leases.	IAS No 16 IAS No 17 IAS No 40
Financial investments	Any asset that is cash, a contractual right to receive cash or another financial asset from another party, or an equity instrument issued by another entity: participation in the capital and loans of related or associated undertakings, own stocks and shares, etc. They are measured using the cost or equity method and are not permitted to be measured at fair value. The value of the asset depends on the valuation method.	IAS No 28
Current assets		
Inventory	Assets that are used by entity for generating revenues over one year or over one operating cycle: raw materials and components, work in progress, finished products and goods for sales. When calculating the cost of inventories used production or the cost sold inventories, which may be determined as a weighted average price or by the first-in, first-out (FIFO) method. The notes to the financial statements provide information on accounting policies adopted for inventory accounting, including the methods of application of accounting and valuation.	IAS No 2
Debtors	Debtors or accounts receivable is the balance of money due to a firm for goods or services delivered or used but not yet paid for by customers. Accounts receivable are carried in the balance sheet at their net worth, calculated by deducting provisions for doubtful debts from the carrying amount of these receivables. The notes to the financial statements provide information on the adopted accounting policy for provisions for doubtful debts.	IAS No 18 IAS No 11

See the continuation of the table on the next page

Continuation of Table 1

Type of asset	Specific of accounting	Standards, law
Financial instruments	Short-term financial investments are participation in capital and securities, derivative financial instruments, etc. The value of transferable securities included in short-term financial investments can be determined as a weighted average price or using the FIFO method.	IAS No 32 IAS No 39 IFRS No 7
Cash	Money in a bank account and cash at the balance sheet date. The foreign currency in the balance sheet is translated into euros at the exchange rate set on the balance sheet date (end-of-day).	IAS No 21

* Created by the authors based on $AFSCFS_{LV}$; FRU_{LT}

Detection Approaches

Fraud Triangle

Fraud is usually hidden, but can be detected using the concept of the fraud triangle, which is recommended for auditors (ISA, 2009). The fraud triangle is a model for explaining factors that cause someone to commit occupational fraud. The term "fraud triangle" was developed decades after D. Cressy's pioneering work with criminals by J. Wells, an agent of the Federal Bureau of Investigation, who founded the Association of Certified Fraud Examiners (Morales et al., 2014).

Figure 2. The Fraud Triangle (ACFE, 2021)

The fraud triangle consists of three components which, together, lead to fraudulent behavior (ACFE, 2021; ISA, 2009):

1. Perceived unshareable financial need (an incentive or pressure to commit fraud).
2. Perceived opportunity (a perceived opportunity to commit fraud).
3. Rationalisation (an ability to rationalise the fraudulent action).

According to the study conducted by Liodorova and Ievitis (2019), the main components of the fraud triangle can be described as follows:

- motive or pressure is primarily the financial need or greed of a potential criminal. The non-financial motivation is the desire to "put up with" the employer's violations;
- opportunity or favourable conditions that allow a person to commit an illegal activity. The authors believe that the main reason for misappropriation of assets is lack of internal control of the company and complex organisational structure of it;
- rationalisation of crime is a rational explanation for action according to their own personal code of ethics. For example, "I deserve this money", "I'll just borrow, and then I'll return everything", because "the victim deserved it" or because "I was mistreated", etc.

Thus, a crime is committed in the presence of all three components.

Red Flags

Distortions in financial statements and accounting records resulting from misappropriation of assets are important to accounting experts. Fraudulent financial statements involve intentional misstatement or omissions of financial statements to mislead users of the financial statements. Fraudulent financial reporting involve (ISA, 2009):

- manipulation, falsification or change in accounting records or supporting documents;
- misrepresentation or intentionally omitting events, transactions or important information;
- intentional misapplication of accounting principles;
- recording fictitious journal entries without supporting documents;
- payment for services or goods not received on the basis of fictitious invoices;
- use of company funds for personal use, etc.

Some undesirable signs of employee behavior or company accounting records are a dangerous signal to accounting experts, drawing their attention and pointing to an issue that needs to be addressed. These signs are often called red flags – factors that can indicate fraud.

A list of possible red flags indicating asset misappropriation have been provided in Table 2.

The authors note that these red flags should be viewed in connection with each other.

Table 2. Examples of red flags for asset misappropriation*

Personal behaviour	Activities	Anomalies in accounting
Living beyond means	Anonymous emails, calls	Warehouse accounting at cost is not performed
Unusually close relationship with partners	Emails are sent at unusual times	More items issued than received
Reluctance to share responsibilities	Obviously inappropriate signatures	Abnormally large balances of goods / debtors
Unusual, irrational behaviour	Transactions started without confirmation	Receivables are not confirmed by debtors themselves
Financial difficulties	Re-grading of goods	Purchased fixed assets are soon written off or sold
Complaints about remuneration	Illiquid balances of goods	Deviations from business indicators
Excessive involvement in accounting policies or concern about these issues	Significant related party transactions that are not a normal business activity	Assets are valued on the basis of estimates related to subjective judgments
Low morale, inappropriate values or ethical standards	Use of business intermediaries without clear justification	Last minute adjustments that have a significant effect on financial results
There is no difference between personal and business transactions	Inventory is not carried out or is carried out formally	Inadequate operating expenses for prepayments with employees (business trips, etc.)
Repeated attempts to justify improper accounting and errors	Canceled checks missing	Frequent changes in accounting estimates unrelated to changed circumstances

* Created by the authors based on the authors' experience and (ISA, 2009; CIMBA, 2008).

Algorithm for Determining Asset Shortage

In the previous study (Liodorova and Shneidere, 2020), the authors developed an International Conceptual Model of Forensic Accounting, which includes the main stages of examination: acceptance, planning, findings, conclusion and reporting. In Table 3, the authors present algorithm for determining the shortage or surplus of assets used in the accounting examination, based on checkpoints and mandatory verification procedures.

This algorithm for determining the shortage of assets can be used not only by forensic accountants, but also by auditors and investigators, as well as for internal needs of the company in detecting misappropriation of assets.

Table 3. Algorithm (created by the authors) for determining asset shortage (surplus)*

Components of examination	Procedures					
	Accounting system	Inventory and its results	Supporting documents	Accounting registers	Recalculation of examination	Comparison of results of the examination with the result of the inventory
	1	2	3	4	5	6
Acceptance / planning						
Purpose	Determination whether asset accounting allows to track the movement of assets and detect balances at the date of inventory	Determination whether inventory results are reliable	determination whether acquisition / disposal of assets, etc., the set and quality of supporting documents complies with the accounting requirements	Determination whether accounting of the assets is accurate and based on supporting documents	Recalculation of the balance of examination assets on the inventory date based on supporting documents	Confirmation or refutation of shortage (surplus) of assets
Identification task	Identification of the asset financial accounting system	Identification of the inventory process	Identification of the circulation of supporting documents	Identification of entries in registers which are not substantiated by supporting documents or which do not correspond to supporting documents	–	Identification of (in) compliance
	Identification of the physical asset accounting system	Registration of an inventory act (identification of inconsistencies)	Determination of (in) compliance with the design of supporting documents			
	Clarification of the specifics of accounting					
Evaluation task	Conformity assessment of the accounting system	Conformity assessment of the inventory process	Assessment of the completeness of supporting documents	Determination of the amount of unreasonable transactions recorded in registers	Balance of assets	Determination of the size of the difference
		Conformity assessment of the planned inventory act	Conformity assessment of document design			

See the continuation of the table on the next page

Continuation of Table 3

Components of examination	Procedures					
	Accounting system	**Inventory and its results**	**Supporting documents**	**Accounting registers**	**Recalculation of examination**	**Comparison of results of the examination with the result of the inventory**
	1	**2**	**3**	**4**	**5**	**6**
Research objects	Inventory acts, acquisitions / disposals, revaluation documents, analytical and synthetic registers, reports, contracts, computer programs, methodological documents, etc.	Inventory acts, reports, methodological documents, etc.	Acquisitions / disposals, revaluation documents, contracts, etc.	Acquisitions / disposals, revaluation documents, analytical and synthetic registers, reports, contracts, computer programmes, etc.	Inventory acts, acquisitions / disposals, revaluation documents, analytical and synthetic registers, reports, contracts, computer programmes, methodological documents, etc.	Results of recalculation of examination, inventory act
Risk assessment	Sufficiency and relevance (research objects, method of examination, expert professional competence)					
Examination (forensic) process						
Methods	Analysis, synthesis, systems analysis	Analysis, comparison, regulatory review	Analysis, synthesis, systems analysis, regulatory review	Analysis, synthesis, induction, systems analysis, document revision	Basic principles of accounting	Counter check
Checkpoints	–	Recalculation of examination	Accounting records	Supporting documents, synthetic registers, reports	Supporting documents, synthetic registers, reports, inventory act	Inventory act, recalculation of examination

See the continuation of the table on the next page

Continuation of Table 3

Components of examination	Procedures					
	Accounting system	**Inventory and its results**	**Supporting documents**	**Accounting registers**	**Recalculation of examination**	**Comparison of results of the examination with the result of the inventory**
	1	**2**	**3**	**4**	**5**	**6**
Possible violations	–	Inventories have not been made or have not been made formally Inventory report has been falsified	Falsification of some supporting documents Incorrect evaluation	Falsification of some supporting documents Incorrect evaluation	Falsification of some supporting documents Incorrect evaluation	Inventories have not been made or have not been made formally Inventory report has been falsified Falsification of some supporting documents Incorrect evaluation
Effects	No significant	Significant	Medium significant	Medium significant	Medium significant	Significant
Risk score assessment	Sufficiency and relevance (research objects, method of examination, expert professional competence)					
Conclusion and reporting						
Conclusion and reporting	Yes / no	Yes / no	Yes / no	Yes / no	Amount of assets	Yes / no Amount of difference (yes)
Estimated	There are shortcomings, but overall asset accounting is acceptable for drawing conclusions	There are shortcomings, but in general the results of the inventory are acceptable for drawing conclusions	There are shortcomings, but the set and quality of the documents are acceptable for drawing conclusions	There are shortcomings, but overall asset accounting is acceptable for drawing conclusions	Asset balance range, minimum or maximum	–
Unable	–	–	–	–	–	–

Conclusion

The study clearly shows that in international practice, there is a discussion among scientists about the most effective methods for detecting misappropriation of assets. According to the Association of Certified Fraud Examiners (ACFE), asset misappropriation is divided into three sub categories: skimming, larceny, and fraudulent disbursements. In order to identify a fraudulent scheme, it is necessary to know specifics of asset accounting. Auditors and investigators use different approaches to detecting fraud. Several studies show that it is useful to use forensic accounting methods to detect misappropriation of assets, such as red flags and the Fraud Triangle. The Fraud Triangle explains factors that lead someone to commit occupational fraud: motivation, opportunity, and rationalisation. It is based on years of experience of American investigators in detecting fraud. Red flags are the dangerous signal of employee behaviour or company accounting records that could indicate fraud. Auditing uses red flags to detect fraud, some of which are described in the International Standard on Auditing (ISA) No 240.

Based on analysis of international practice and scientific literature, the authors of the study compiled a list of red flags on misappropriation of assets and developed an algorithm for determining asset shortage or surplus using forensic accounting methods. The research results can be applied in practice not only by forensic accountants and auditors, but also by investigators, as well as for a company's internal needs in detecting misappropriation of assets. Correct determination of the shortage or surplus of the assets and its amount is also necessary in investigation of other economic crimes: bankruptcy fraud, corruption, money laundering, tax evasion, etc. Standards of the International Organization for Standardization (ISO) require mandatory validation of forensic methods, which is possible through international recognition of methods in scientific environment.

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Comparative Study on Frequency of Various Papillary Pattern Types in Estonian Men and Women

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Abstract

The authors of the article conducted a comparative study to determine the incidence frequency of various papillary patterns in men and women. In the framework of this study, the authors collected and performed analysis on data published in the subject literature. Comparative analysis was performed to check for potential similarities and differences in papillary patterns, types, and groups in men and women, using data on the patterns in both hands. This article presents the results of the study.

Keywords: arch ridge pattern, comparative analysis, left hand, loop ridge pattern, men, right hand, whorl ridge pattern, women.

Introduction

Forensic literature defines shapes formed by papillary ridges and allows to identify various papillary ridge patterns. The papillary ridges are classified by type as arch, loop and whorl ridge patterns.

These types of papillary ridges are further classified into individual forms and groups. Based on the construction of papillary ridges, it is also possible to classify papillary patterns. Papillary patterns are classified as simple, complex, false, rare, and aberrant ridges according to their structure (Ogle, Plotkin, 2017).

In forensics, a system of general and special features is applied in identification and analysis of fingerprint ridges. Structure-wise,the simplest ridge pattern is the arch, which occurs in about 5 % of human fingerprints. Loop ridge patterns form about 65 % and whorl ridge patterns about 30 % of total ridge patterns found on human fingers (Lindmäe, 1976).

This knowledge prompted the authors of this article to conduct a study to determine the presence of common features and different classifications in male and female fingertips. The study included fifty-seven men and thirty-one women, and the gender of five individuals remained unknown. Since fingerprints of unidentified persons were nevertheless suitable for analysis, dactyloscopic maps of ninety-three persons were examined in the first part of the study. The second and third parts of the study analysed dactyloscopic cards of fifty-seven men and thirty-one women; the fingerprints were made on formal cards, using black ink. The study focused on the following:

1) determination of distribution of papillary patterns on the fingers and comparing it with the results published in the literature;
2) identification of possible differences and similarities in papillary ridge patterns on the fingertips of women and men;
3) results of comparison of papillary ridge patterns on the fingers of the right and left hand in both women and men;
4) determination of distribution of papillary ridge patterns on the left hand fingers in both women and men.

In the framework of this study, no attention was paid to specific characteristics that distinguish papillary ridges; instead, the authors sought to check connections between types and groups of papillary ridges.

In order to determine the suitability of a fingerprint for identification, a qualitative and quantitative assessment of identification features and their set should be provided (Averjanova, Statkus, 2011). It should be borne in mind that structural details of papillary ridges, as well as their general properties, are not uniform.

The authors of this article also focused on treatment of common issues of statistical dactyloscopy by various authors, such as A. J. Paliashvili (Krilov, 1961), I. I. Prorokov (Prorokov,1980), V. A. Andrianova (Edzubov, 1999), V. E. Kornouhov (Kornouhov, 1982), J. W. Osterburg and R. H. Ward (Osterburg, Ward, 2010), H. M. Daluz (Daluz, 2014), J. A. Eterno and C. Roberson (Eterno, Roberson, 2015), I. V. Kantor (Kantor, 2003), Melcon S. Lapina (Lapina, 1996), M. Reinhardt (Reinhardt, 2016), N. P. Mailis (Mailis, 2008) and U.S. Department of Justice (U.S. Department of Justice, 2014).

The study by A. J. Paliashvili dates back to the 1960s. He discussed the materials of the study in his presentation at a conference on forensic issues held in Leningrad on 28 June–2 July, 1960. A similar study was carried out by I. I. Prorokov in the 1980s. Comparison of the general characteristics of the papillary ridge patterns presented by the authors of this article in 2021 and those presented in earlier decades shows the importance of statistical dactyloscopy in the field of expertise, its constancy and, looking ahead, the evolution towards digitisation. In the current article, the authors do not delve into specific traits discussed by A. J. Paliašvili within the framework of his study, and focus on general traits instead.

The authors of this article used the first section of the table provided in the practical material *Dactyloscopy and Dactyloscopic Expertise* (Anishchenko, 2013) which covered the groups and types of papillary ridge patterns. The authors of the article divided the table into three types according to types of papillary ridges and analysed the data presented there comparing it with the data collected by them.

Course of the Research

Determination of distribution of the pattern of papillary ridges on the fingers and comparing it with the results published in the literature

As noted in the introduction, the incidence of whorl ridge pattern according to the literature is about 30 %. Of the ninety-three people in the study (out of 930 fingerprints taken), whorl ridges were recorded on 276 fingers.

Table 1. Whorl Ridge Pattern Frequency

	Feature	Occurrence frequency of feature, %		
		A. J. Paliashvili, 50 people (500 prints)	I. I. Prorokov, 1000 people (10 000 prints)	A. Lall, 93 people (930 prints)
Whorl ridge patterns of nail phalanges of fingers		25.60	30.00	29.67
1	Plain-circle	—	93.60	61.21/6.15
2	Oval	9.00	16.50	21.01
3	Spiral	16.60	71.00	19.20
4	Loop-spiral	—	—	14.85
5	Complex-loops-spirals	—	3.80	15.94
6	Loops-bifurcated loop-coils	—	2.60	13.04
7	Loops-one-way ending loop-coils	—	—	2.17
8	Loop-snail	—	—	0.36
9	Curved loop	—	8.50	—
10	False-incomplete	—	4.00	6.52
11, 12	Rare whorl patterns	—	—	0.72

If we look at the table where the appearance of whorl ridge pattern was studied in groups of fifty, 1000 and ninety-three people, it can be concluded that what was reported in the literature also corresponds to what has been found in practice. Although the incidence of whorl ridge pattern is less than 30 % (25.6 %) for the 500 fingerprints left by fifty people, it can be claimed that in 1000 people and 10,000 prints and ninety-three people and 930 prints the incidence is 30 %.

In the explanation in Table 1, the simple ridge pattern includes a circle, an oval, a spiral and also a loop spiral. The A. J. Paliashvili study does not specify how many participants had simple ridge patterns in the form of a circle.

The I. I. Prorokov (Prorokov, 1980) study does not provide the percentage of simple circle-type ridge patterns; however, proportionally speaking, it is 6.1 % of all simple ridge patterns. In his study, 93.6 % of the studied patterns consisted of simple ridge patterns, i.e. circle, oval, spiral and loop-spiral ridge patterns. Of the fingerprints of ninety-three people studied by the authors of the article, 61.21 % had simple ridge patterns and 6.15 % of these were circular in shape. Thus, in the case of both 10,000 prints and ninety-three prints, the percentage of circular ridges was 6.1–6.15 %, i.e. the same. The most common simple pattern in the current study of 930 fingerprints was the oval pattern, which constituted for 21.01 % of all patterns. In the Prokorov study, the corresponding number was 16.5 % and for A. J. Paliashvili it was 9 %. Spiral pattern frequency in the I. I. Prorokov study was 7.1 %, in the A. J. Paliashvili study 16.6 % and in the current study 19.2 %. Loop-spiral type whorl ridge pattern was only recorded in the current study (14.85 %) and other studies do not appear to have measured its frequency.

The complex ridge block provided in the table is divided as follows: loop-spirals, bifurcated loop-coil, one-way ending loop coil, snail-loop and curved loop.

A. J. Paliashvili's study does not address these ridge pattern types. It records loop-spirals as 3.8 % of the total, whereas the authors of the article found the corresponding pattern frequency to be 15.95 %. According to the A. J. Paliashvili study, the frequency of bifurcated loop-coil is 2.6 % and in the current study, the corresponding frequency was 13.04 %. The frequency of the one-way ending loop-coil and the snail-loop ridge pattern was not recorded in the A. J. Paliashvili study. According to the authors of this article, the frequency of these patterns is correspondingly 2.17 % and 0.36 %. A. J. Paliashvili records the frequency of snail-loop ridge in total of 8.5 % fingerprints. The authors of this article did not record snail-loop ridge type in the participants of this study.

False-Incomplete whorl ridge patterns and rare whorl ridge patterns were not covered in the A. J. Paliashvili study. In the studies conducted by I. I. Prorokov and the authors of the article, false or incomplete whorl ridge patterns occurred in 4 % and 6.25 % of the fingerprints, respectively. Rare whorl ridge patterns occurred in 0.72 % of the study participants.

The incidence of the arch ridge pattern is considered to be 5 %. Based on Table 2, it can be noted that the results of 7.4 % per 50 people studied by A. J. Paliashvili and 7 % per 1000 people studied by I. I. Prorokov show the incidence of the arch ridge pattern, which corresponds closely to the data presented in the literature.

Table 2. Arch Ridge Pattern Frequency

	Feature	Frequency of the feature, %		
		A. J. Paliashvili, 50 people (500 prints)	I. I. Prorokov, 1000 people (10 000 prints)	A. Lall, 93 people (930 prints)
Arch ridge patterns of nail phalanges of fingers		7.40	7.00	13.01
1	Plain-plain arch pattern	5.40	—	22.31
2	Complex-tented arch pattern	2.00	—	8.26
3	Arch pattern with undefined core structure	—	—	5.78
4, 5	False-false loop arch patterns	—	—	56.19
6, 7	False-false whorl arch patterns	—	—	7.43
8	Rare patterns – rare pattern related to arch pattern	—	—	—
9	Abnormal – abnormal pattern	—	—	—

The current study concluded that 13.01 % of ninety-three participants had arch ridge patterns on their fingertips; this is almost two times more than the 5 % suggested in the literature. However, it should also be noted that the data provided by I. I. Prorokov is limited to general arch ridge pattern percentage.

Similarly to how the whorl ridge pattern is classified according to the structure of papillary patterns, the arch ridge pattern is also divided into several groups: simple or regular; complex, which includes ridge pattern with an undefined centre; false arche patterns, which include false loop arch pattern and false whorl arch pattern. The grouping also includes rare arch patterns and anomalous ridges. Since the present study did not include any participants with the following two groups and A. J. Paliashvili and I. I. Prorokov did not record such groups, these lines were removed from the table.

The simple or regular arch ridge pattern occurred in 5.4 % out of fifty people and 22.31 % out of ninety-three people. Complex or pyramid/tented patterns occurred in 2 % of fifty people and in 22.31 % of ninety-three people.

The ninety-three-person study carried out by the authors of this article demonstrated that the incidence of the ridge pattern with an undefined core was 5.78 %; false arch ridge pattern, which also includes false loop arch ridge pattern, occurred in 56.19 % of the cases and false whorl arch pattern in 7.43 % of the cases.

A. J. Paliashvili and I. I. Prorokov's studies did not record ridge patterns with an undefined core, which includes false loop arch pattern and false whorl arch pattern.

According to the literature, the loop ridge pattern occurs in 65 % of all prints. In Table 3, the papillary patterns are classified according to their structure as a simple loop, a curved loop, a half loop, and a closed loop. The complex pattern group includes parallel and reverse loops.

Table 3. Loop Ridge Pattern Frequency

	Feature	Occurrence frequency of feature, %		
		A. J. Paliashvili, 50 people (500 prints)	I. I. Prorokov, 1000 people (10 000 prints)	A. Lall, 93 people (930 prints)
Loop ridge patterns of nail phalanges of fingers		67.00	63.00	57.31
1	Simple – simple / plain loop	—	95.00	83.86
2	Curved loop	—	Units	1.13
3	Half loop	—	2.00–2.50	4.13
4	Closed loop	4.00	—	4.13
5	Complex – parallel loops	—	—	—
6	Complex – reverse loops	0.20	—	—
7, 8	False – false whorl loop patterns	—	—	6.75
9	Rare pattern – rare patterns related to loop patterns	—	—	—

The false pattern group consists of false whorl loop ridge patterns, and the rare pattern group includes ridges that are rarely found and which belong under the loop ridge type.

Studying the data presented in Table 3, it can be stated that 67 % prints out of 500 and 63 % out of 10,000 had loop ridge patterns, which quite closely follows the data provided in the literature. The study of 930 prints shows a small difference, since only 57.31 % of participants had loop ridge patterns. Compared to the literature, the difference is 7.7 %.

A. J. Paliashvili has not recorded any information on the simple or the regular loop ridge pattern. In the I. I. Prorokov study the incidence of the simple pattern is 95 % per 10,000 prints and in the study conducted by the authors of this article it is 83.86 % per ninety-three people. A. J. Paliashvili's study does not include any data on the curved and half loop ridge pattern. Since the proportion of the curved ridge pattern in the studied prints was quite low, I. I. Prorokov has listed only a few values in his table, and the authors of this article found the corresponding incidence to be 1.13 % of the data collected. In the study of 10,000 prints, I. I. Prorokov found that the half loop occurred in 2.0–2.5 % of the cases, whereas the authors of this article found the corresponding value to be 4.13 %.

I. I. Prorokov has not provided any data on the closed ridge pattern, while the records of A. J. Paliashvili, for 500 prints and the authors of the article for 930 prints show 4 % and 4.13 %, respectively. As for the parallel loops, which belong in the complex ridge pattern group, none of the people in the study appeared to have any. As for the reverse loops which belong to the same group, A. J. Paliashvili noted that these occurred in 0.2 % in their recorded cases. I. I. Prorokov and the authors of this article did not identify reverse loop ridges in any of the collected fingerprints. False whorl loop ridge pattern of

the false group was recorded in 6.75 % cases in total of 930 prints. In the data collected by A. J. Paliashvili and I. I. Prorokov, false whorl loop ridge pattern does not occur. In this study, no rare loop ridge patterns were found.

Identification of potential similarities and differences in papillary ridge patterns in the fingerprints of men and women

The study included ninety-three people, fifty-seven men and thirty-one women, and five participants could not be identified, thus the gender-based papillary pattern comparison was carried out on eighty-eight people. The fingertips were analysed using the same ridge classification system as in previous tables.

Out of 310 fingerprints belonging to women, the arch ridge pattern was found in fifty fingerprints, i.e. 16.12 %. The loop ridge pattern was found on 166 fingers, which is 53.54 %, the whorl ridge pattern in ninety-four fingers, or 30.32 % of fingerprints studied.

Examination of 570 male fingerprints showed that sixty-three fingers, or 11.05 %, have an arch ridge pattern. The loop ridge pattern occurred on 330 fingers, which is 57.89 % of the studied prints. The whorl ridge pattern was observed in 177 fingers or 31.05 % of male fingerprints.

Whorl Ridge Pattern. Of the fifty arch ridge patterns identified in women, fifteen had simple or regular ridge patterns. A complex-tented pattern was detected in six prints, four prints had an unidentified core, the false-false loop arch ridge was on twenty two prints and a false-false whorl ridge pattern on three prints.

Of the sixty-three arch ridge patterns that appeared on male fingerprints, twelve were simple or regular ridge patterns. The complex or pyramid/tented pattern was discovered in four prints, undefined centre in three prints, false-false loop in thirty-eight prints, and false-false whorl in twenty-six fingerprints. Rare arch ridge patterns and anomalous ridges were not observed in either hands.

Loop Ridge Pattern. The loop ridge pattern was found in the fingerprints of 166 women. Of these, 137 prints had simple or regular ridge patterns. Simple ridges had curved loops in two, half loop in four, and closed loop in ten fingerprints. False-false whorl loop ridges were found in thirteen fingerprints.

330 male fingers had the loop ridge pattern. Of these, 277 fingerprints had simple or regular ridge patterns. Simple ridges with curved loops were found in three, half loop in eighteen, and closed loop in eleven fingerprints. False-false whorl loop ridge pattern was found on twenty-one fingers. Neither complex ridges – parallel and reverse loop ridges nor rare loop ridges were detected in any of the collected loop ridges.

Whorl Ridge Pattern. In the study, a whorl ridge pattern was found in ninety-four female fingerprints. Of these, a simple or circular pattern was found in five, oval in thirty,

spiral in seventeen, loop-spiral in eight fingerprints. Complex loop-spirals were found in fourteen, bifurcated loop-coil in eleven, loop-coils with endings in the same direction in three, and false-incomplete whorl ridge pattern in six fingerprints.

177 male fingerprints had a whorl ridge pattern. Of these, simple ridge was found on twelve, oval on twenty-eight, spiral on thirty-six and loop spiral on thirty-three fingers. Complex loop-spirals were found in thirty, bifurcated loop-coil in twenty two, loop-coil with endings in the same direction in three and snail-loop coil in one fingerprint. False-incomplete whorl ridge pattern was found in ten and rare whorl ridge in two cases. No complex curved loop was found in any cases containing the whorl ridge pattern.

Results of comparison of papillary ridge patterns on the right and left hands of men and women

Arch Ridge Pattern. Women who participated in the study had an arch ridge pattern on the right hand in twenty and on the left hand in thirty cases. Percentually, this means 12.90 % for the right and 19.35 % for the left hand, 32.25 % in total. The following analysis covers arch ridge patterns that were found in the course of the study.

Female thumbs had two ridge patterns of which false loop arch pattern was on five fingers and false whorl arch pattern on one finger. On index fingers, a simple ridge pattern was found in six cases, pyramid/tented ridge pattern in three, ridge pattern with an undefined core in one case, false loop arch was found on seven fingers and false whorl arch ridge pattern on one finger. On middle fingers, a simple ridge pattern was found in six cases, pyramid/tented ridge pattern and a ridge pattern with an undefined core in two cases, and false loop arch pattern was found in three cases. Ring fingers had a simple, pyramid/tented, undefined core and false whorl arch pattern in one case. False loop arch ridge pattern was found on four fingers. On little fingers, there were no instances of pyramid/tented, undefined core and false whorl arch ridge detected. Rare arch ridge patterns and anomalous ridges were not detected on any of the collected fingerprints.

Of male study participants, twenty-six had arch ridge patterns on the right hand and thirty-seven on the left hand, i.e. 9.12 % for the right and 12.98 % for the left hand; 22.10 % in total.

Following analysis covers arch ridge patterns found in fingerprints of male participants.

Male thumbs had two ridge patterns, of which false-false loop arch ridge pattern occurred in two cases and the ridge pattern with an undefined core in one case.

On index fingers, simple ridge pattern was found in eight cases, pyramid/tented ridge pattern in three, ridge pattern with an undefined core in one case, false-false loop arch was found on four fingers and false-false whorl arch ridge pattern on one finger. On middle fingers, a simple ridge pattern was found in two cases, pyramid/tented ridge pattern and ridge pattern with an undefined core in one case and false-false loop arch

pattern was found in three, and false-false whorl ridge pattern in two cases. Ring fingers, however, had a simple ridge pattern in one case, false loop arch in five and false whorl ridge pattern in two cases. On little fingers, a simple ridge pattern was found in one case, false loop arch in nine and false false whorl ridge pattern in one case.

Similarly to women, rare arch ridge patterns and anomalous ridges were not detected on any of the fingerprints collected from men.

Loop Ridge Pattern. Female fingerprints were found to have a loop pattern on the right hand in sixty-five cases and on the left hand in eighty-six cases, which means that the figure is 51.61 % for the right hand and 55.48 % for the left hand, for a total of 107.09 % of both hands. This indicates that the loops are far more common than the arches.

Female thumbs had a simple ridge pattern in twenty-seven cases and false whorl loop pattern in two cases. Index fingers had a simple ridge pattern in twenty-two cases, making this the most common pattern, whereas curved and false whorl loop pattern occurred twice in both cases, half and closed loop pattern in one case. Middle fingers had a simple ridge pattern in thirty-one cases, closed loop ridge was found in one and false whorl loop ridge patterns in three instances. Ring fingers had simple ridges in fourteen instances, half loop pattern in one, closed loop pattern in seven and false whorl loop pattern in four instances. Little fingers had most commonly the simple loop pattern (forty-three instances), whereas half loop ridge was found in two, closed loop in one and false whorl loop ridge in two instances. Neither complex ridges with parallel and reverse loops nor rare loops were detected in loop pattern analysis.

In men, the loop pattern was found on the right hand in 157 cases and on the left hand in 173 cases, making the value 55.08 % for the right and 60.70 % for the left hand, with 115.78 % in total. This indicates that the loop pattern is also several times more common for men than the arch pattern.

Male thumbs were found to have the simple ridge-regular loop fifty-nine times, curved loop in two, and half loop in one case. Index fingers had regular loop ridge forty-four times, curved loop one time, half loop five times, and closed loop four times. Middle fingers had the regular loop sixty-four times, half loop two times, and false-false whorl loop pattern four times. Ring fingers had a regular loop forty times, half loop five times, and closed loop five times. Little fingers had a regular loop seventy times, half loop five times, closed loop two times, and false-false whorl loop pattern four times. Neither complex ridges with parallel and reverse loops nor rare loop ridges were detected on either hands.

Whorl Ridge Pattern. Women were found to have the whorl ridge pattern on the right hand in fifty-five instances and on the left hand in thirty-nine instances, meaning that the frequency value for the right hand is 35.48 %, for the left hand 25.16 % and in total – 60.64 %. It may be claimed that the whorl ridge pattern is more common than the arch pattern, but also twice as uncommon as the loop pattern.

Female thumbs most frequently had the simple type of the whorl ridge pattern; the circle pattern was found in one case, oval ridge in four cases, spiral ridge and loop spiral

in two cases, complex spiral loop in nine cases, bifurcated loop coil in nine cases, one-way ending loop-coil in one case, and false incomplete whorl ridge pattern in one case. No snail loop, curved loop or rare loop patterns were found on any of the thumb prints.

On index fingers, a simple pattern, i.e. circle, was found in two instances, oval in five instances, spiral in six instances, complex loop spiral in two instances, and bifurcated loop-coil and one-way ending loop-coil were each found in one instance. No loop-spiral, snail-loop, curved loop ridge patterns, false-incomplete whorl ridge and rare whorl ridge were found on index fingers. In middle fingers, oval ridge was found five times, spiral once, complex loop-spirals twice, bifurcated loop-coils twice, one-way ending loop-coils once and a false incomplete whorl ridge pattern was found three times. However, middle fingers did not have any instances of simple circular, oval, loop-spiral, snail-spiral, curved loop and rare whorl ridge patterns. Nevertheless, ring fingers were found to have a simple circular pattern in two cases, oval in fourteen cases, spiral in six cases, loop-spiral in four cases, and false incomplete whorl pattern in two cases. The little finger had oval, spiral and loop spiral ridges in two cases and complex spiral loop in one case. No circular simple ridge, one-way ending loop-coil, snail-loop, curved loop, false incomplete whorl ridge and rare whorl ridges were found on little fingers.

Men had the whorl ridge pattern on the right hand in 102 and on the left hand in seventy-five instances, making it 35.78 % for the right hand and 26.31 % for the left hand, and 62.09 % in total. It can be stated that the whorl ridge pattern is more common than the arch pattern, yet nearly twice as rare as the loop pattern.

Male thumbs had the simple circular ridge in three cases, oval in two cases, spiral in six cases, and loop-spiral in seven cases. Complex ridge loop spirals were found in thirteen cases, bifurcated loop-coil in fifteen cases, one-way ending loop-coils in one case, and false incomplete whorl ridge pattern in two cases. On index fingers, a simple circular ridge was found in three cases, oval in seven cases, spiral in four cases, and loop-spiral in eight cases. Complex loop-spirals were found in six cases, one-way ending loop-coils in one case, snail loop in one case, and false incomplete whorl ridge pattern in one case. Middle fingers were found to have the simple circular ridge in three cases, oval in two cases, spiral in seven cases, and loop-spiral in six cases. Complex ridge loop spirals were found in five cases, bifurcated loop-coils in two cases, false incomplete whorl ridge in one case, and rare whorl ridge patterns in two cases. Ring fingers were found to have the simple circular ridge in three cases, oval in fifteen cases, spiral in thirteen cases, and loop-spiral in nine cases. Complex loop spirals and false incomplete whorl ridge patterns were found in one case. Little fingers had the simple circular ridge in one case, oval in two cases, spiral in six cases, and loop spiral in three cases. Complex loop spirals were found in one case, bifurcated loop coil in two cases, one-way ending loop-coil in one case, and false incomplete whorl ridge pattern in five cases.

Complex ridge – snail loop and curved loop ride were not found in any left hand prints taken from the male participants. No curved loop ridges were found on the right hand prints.

Determination of distribution of papillary ridge patterns in male and female right and male and female left hand

The ten-finger dactyloscopic record system has been designed to identify individuals by using all of their ten fingers. In order to keep the dactyloscopic record and systematisation of ten fingers according to set principles and to simplify the work, the dactyloscopic cards have been numbered in a way that allows to record the fingers of the right (1–5) and left (6–10) in set order. The fingers are numbered in the table in accordance with this system.

Of the total of 880 prints (eighty-eight men and women), the arched ridge pattern was found on the right hand in forty-six cases and on the left hand in sixty-seven cases, making 5.23 % for the right hand, 7.61 % for the left hand and 12.84 % in total for both hands.

As for the frequency of the arch ridge pattern on the right hand for men and women and the left hand of men and women, it must be noted that false-false looped arch ridges have been detected as the most common. This pattern type occurs on all fingers of both hands. Although the frequency varies, depending on the finger, it is most common on index fingers, middle fingers and little fingers. Simple or regular and complex – pyramid/tented arch ridge was missing on both left and right thumbs for both men and women. Simple – regular arch ridge was found on all other fingers to a lesser degree. The patterns with an undefined core and false whorl ridge pattern were also found to a lesser degree.

Since no rare arched ridge patterns were found on any of the participants, this line was not represented in Table 4 (line 9).

According to Table 5, the loop pattern was found in 237 right hand prints and 259 left hand prints of eighty-eight male and female participants (880 prints in total), which means that the incidence frequency of the loop pattern for the right hand is 26.93 % and for the left hand 29.43 % , which in turn yields a total of 56.36 % for both hands. The right hand most commonly had the simple loop pattern, as also evident from the Table. Thumbs, index and middle fingers had a similar loop pattern distribution frequency, ranging from two to six. On the ring and little fingers, the distribution frequency was greater, ranging from thirteen to fourteen. Simple ridge-curved loop was found on two fingers – twice on the thumb and the index finger of the left hand and once on the index finger of the right hand. The curved loop was not detected on the middle, ring and little fingers of either hands. No simple ridge – half loop and closed loop was found on the middle finger of the left hand. On other right and left hand fingers, the above listed types were detected to a lesser degree.

Since none of the participants had any instances of complex, and rare loop ridge patterns, these lines were not represented in Table 5 (lines 5, 6 and 9).

Table 4. Arched Ridge Pattern Divided Men / Women Right Hand and Men / Women Left Hand

Ridge name / pattern		Right and left hands									
Data of 88 male and female study participants		Thumb		Index finger		Middle finger		Ring finger		Little finger	
Arch loop	R-46 L-67	1	6	2	7	3	8	4	9	5	10
1	Simple – regular	—	—	5	9	2	6	1	1	1	2
2	Complex – pyramid / tented	—	—	2	4	1	2	—	1	—	—
3	Undefined core	1	—	—	2	1	2	—	1	—	—
4, 5	False-false looped arch ridge	2	5	8	8	6	10	3	5	8	5
6, 7	False-false whorl ridge pattern	—	1	—	2	1	1	3	—	1	—

Table 5. Looped Ridge Pattern Divided Men / Women Right Hand and Men / Women Left Hand

Ridge name / pattern		Right and left hands									
Data of 88 male and female study participants		Thumb		Index finger		Middle finger		Ring finger		Little finger	
Loop pattern	R-237 L-259	1	6	2	7	3	8	4	9	5	10
1	Simple – simple / regular loop	40	46	34	32	50	45	20	34	50	63
2	Curved loop	—	2	1	2	—	—	—	—	—	—
3	Half loop	—	1	4	2	2	—	1	5	3	4
4	Closed loop	—		2	3	1	—	9	3	3	—
7, 8	False-false whorl loop pattern	—	2	3	1	4	3	7	8	3	3

Data of Table 6 indicate that the whorl pattern was found in 157 right hand prints and 114 left hand prints of eighty-eight male and female participants (880 prints in total), which means that the frequency of the whorl ridge pattern for the right hand is 17.84 % and for the left hand 12.95 %, which in turn yields a total of 30.79 % for both hands.

It is interesting to note that nearly all whorl ridge pattern types have been represented on both hands of both genders. Most commonly indicated patterns are simple ridges – oval which occurs twenty-two times and spiral which occurs eleven times on the ring finger of the right hand. Complex type – loop-coil with a one-way ending was recorded eleven times on thumbs. The least common complex ridge was snail-loop, which was recorded once on the index finger of the right hand. Rare whorl ridge was found on the middle fingers of both hands, once per hand. Simple ridges – circle, oval, spiral, loop-spiral were found on all fingers. Complex ridges – loop-spirals were most commonly found on thumbs and index fingers (10/12 and 5/7); on other fingers the frequency was lower.

Since none of the participants had any instances of complex curved ridge patterns, this line was not represented in Table 6 (line 9).

Table 6. Whorl Ridge Pattern Divided Men / Women Right Hand and Men / Women Left Hand

Ridge name / pattern		Right and left hands									
Data of 88 male and female study participants		Thumb		Index finger		Middle finger		Ring finger		Little finger	
Whorl ridge pattern R-157 L-114		1	6	2	7	3	8	4	9	5	10
1	Simple – circle	3	1	4	1	3	—	3	1	1	—
2	Oval	4	2	7	5	4	3	22	7	3	1
3	Spiral	6	2	4	6	7	1	11	8	4	4
4	Loop-spiral	7	2	5	3	2	6	6	7	3	2
5	Complex-loops-spirals	10	12	5	7	2	5	1		1	1
6	Bifurcated loop-coils	11	11	—	1	1	3	—	3	2	1
7	One-way ending loop-coils	2	—	1	1	—	1	—	—	—	—
8	Snail-loop	—	—	1	—	—	—	—	—	—	—
10	False – incomplete whorl ridge pattern	3	—	1	—	2	2	1	2	5	—
11	Rare whorl ridge patterns	—	—	—	—	1	1	—	—	—	—

Conclusions

The authors studied the distribution of papillary ridge patterns on fingertips of the participants and compared the results with the results published in the literature.

It was found that the results published in the literature, which reflect the incidence frequency of the whorl ridge pattern on fingertips of fifty, 1000 and ninety-three people, coincide with the results of the present study. Although in the study with fifty people and 500 fingerprints the incidence frequency of the whorl ridge pattern is below 30% (25.6%), by looking at 1000 people and 10,000 prints and ninety-three people and 930 prints, it can be maintained that it constitutes for 30% of found patterns. It is therefore possible to claim that the results obtained by the authors of this article and the results published in the literature are quite similar.

In case of the arch pattern, there was a notable difference between the data collected by the authors of this article and that provided in the literature; the difference is approximately 6%.

In the case of loop patterns, the number of ridge patterns listed by A. J. Paliashvili is lower than the values found in the studies of I. I. Prorokov and A. Lall. It is nevertheless possible to say that in general the values are not significantly different.

Since the studies of A. J. Paliashvili and I. I. Prorokov did not divide the participants by gender, the further study was carried out by the authors of this article on the basis of data collected by A. Lall. The authors sought an answer to possible differences and coincidences in papillary patterns on fingerprints of men and women.

Arch ridge pattern was found in fifty fingerprints taken from 310 women who participated in the study, constituting 16.12% of the total. The same ridge pattern was found

in sixty-three fingerprints taken from 570 male participants, which in turn constitutes for 11.05 % of the total. Loop ridge pattern was found in the 166 fingerprints taken from women, constituting 53.54 % of the total. The same ridge pattern was found in 330 fingerprints taken from men, which in turn constitutes for 57.89 % of the total. Whorl ridge pattern was found in ninety-four fingerprints taken from women, constituting 30.32 % of the total. The same ridge pattern was found in 177 fingerprints taken from men, which in turn constitutes for 31.05 % of the total. Thus, it can be claimed that the percentages for all three ridge pattern types are very close for both genders, despite the fact that thirty-one women and fifty-seven men participated in the study.

By comparing papillary ridge patterns on the right and left hands of both men and women, it was noted that both genders have a lower incidence of arched ridge patterns on both hands. For women, arch ridge pattern occurred on the right in 12.90 % of the cases and on the left hand in 19.35 % of the cases, which adds up to 32.25 % for both hands. For men, these values were 9.12 % for the right and 12.98 % for the left hand; 22.10 % in total. A commonality for the left hand in men and the right hand in women was that the rare arch ridge and anomalous ridges were not found. On the right hands of women, no ridges with an undefined core were found, whereas such a ridge was found on the right hands of men in two instances.

For women, loop ridge pattern occurred on the right in 51.61 % of the cases and on the left hand in 55.48 % of the cases, which adds up to 107.09 % for both hands. For men these values were 55.08 % for the right and 60.70 % for the left hand; 115.78 % in total. The loop ridge pattern occurence is several times more frequent in both male and female fingerprints than the arch ridge pattern. It was also noted that neither complex loops with parallel and reverse loops nor rare loop ridge were found on any of the hands of both male and female study participants.

For whorl ridge pattern, it must be noted that it was found on the right hand in 35.48 % and on the left hand in 25.16 % for female participants, yielding a total of 60.64 %. For men whorl ridge pattern was found on the right hand in 35.78 % and on the left in 26.31 % of the cases, making a total of 62.09 %.

It can be stated that the whorl ridge pattern prevails the arch pattern; however, it also occurs nearly two times less frequently than the loop pattern. It is also interesting to note that for the whorl ridge pattern, a simple circular ridge was not found on index, middle, ring and little fingers of the left hand. The women also had the simple circular ridge only on two of the left hand fingers – index and ring finger to be precise.

Interestingly, both women and men had the same percentage of whorl ridge pattern on both hands. Thus, for the whorl ridge pattern the results in both groups in the study were similar despite the fact that fewer women than men (thirty-one women and fifty-seven men) participated in the study.

To determine the distribution of papillary ridge patterns on fingerprints of the right hand of men and women and the left hand of men and women, papillary ridge patterns of eighty-eight male and female study participants (880 prints in total) were

examined by the authors. In the course of the process, arches were found in forty-six cases in the right hand prints of the subjects and in sixty-seven cases in the left hand prints, therefore, the frequency is 5.23 % for the right hand and 7.61 % for the left hand, which totals to 12.84 % of incidence frequency for the arch pattern in both hands of men and women.

The study participants had a loop ridge on the right hand in 26.93 % of the cases and on the left in 29.43 % of the cases, which in total constitutes 56.36 % of the loop ridge pattern on both right and left hands of men and women.

The percentage for the whorl ridge patterns for the right hand was 17.84 % and for the left hand 12.95 %, which constitutes 30.79 % in total for whorl ridge patterns for both men and women. It is interesting to note that practically all whorl ridge types were represented on the right and left hands of men and women. The complex pattern – curved loop was not found in the fingerprints provided by the study participants.

As a result of the survey and analysis, the authors dare to state that regardless of the number and gender of the survey participants and the decade, the distribution of gutter types is very close to the figures reported in the literature. It has therefore been confirmed that there are fewer arches than other types of ridges, that loop ridges are the most common ridges followed by the whorl ridge pattern. A similar percentage distribution of patterns was observed in the right and left hands of men and women in this study, as well as in the cross-comparison of papillary ridge patterns, based on fingerprints of men and women.

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Aspects of Formation of Legal Status of Subterranean Depths

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Abstract

The aim of the study is to identify and investigate ownership trends in exploration and use of subterranean depths of Latvia, by examining aspects of legal status of subterranean depths. The following methods were used as part of the study: (1) analytical method used for gaining and analysing the amount of information obtained, as well as for structuring research work; (2) comparative method for analysis and comparison of legal frameworks between European continent countries for the use of subterranean depths in regulatory enactments; (3) empirical method based on facts obtained objectively and systematically through collection of information.

The main results of the study include:

1. Today, when society's demand for energy is growing rapidly to ensure the well-being of society, and technology is evolving more rapidly so that energy resources can be used in an increasingly economic way, it is important to be able to separate the public's common interest and private interest in energy resources located in the subterranean depths.
2. In the 21st century Latvia, legal framework for the ownership of subterranean depths has not carried out the introduction of a legal framework corresponding to the needs of modern society and technological capabilities to be able to perform systematically both the search and exploration of new mineral resources and other resources of subterranean depths and the establishment of a national strategy for the exploitation of subterranean depths.

Keywords: legal status, ownership, property, subterranean depths.

Introduction

The rights to property are essential rights of an individual, because a person's well-being is largely dependent on them. The right to property is one of the oldest and best developed sectors of the law (Reine, 1999).

The aim of this article is to look at ownership trends in the research and use of Latvian subterranean depths, describing aspects of formation of subterranean depths` legal status. In the framework of the study, the main methods used were 1) analytical method that is used for gaining and analysing the amount of information obtained, as well as structuring the research work, 2) comparative method, with the help of which legal frameworks in relation to the use of subterranean depths that are determined in regulatory enactments were analysed and compared, 3) and empirical method based on facts obtained objectively and systematically through collection of information.

Subterranean layers or subterranean depths are part of the earth's crust, located under the soil and surface waters unto the depth, where geological studies, mineral extraction or their use is economically and technically possible. In practice, the owner's right to the subterranean depths is mainly important from the point of view of the (positive) use of the property (Grutups & Kalnins, 2002).

Although modern society lives in the industrial age, the climate, natural resources and land and its useful properties, as a type of resources, are gaining an increasing attention and importance.

In land management "land" is described as a physical object to which specific rights are attributed, and which has a certain value. Land is considered a business object in the real estate market, which has a certain economic, social, ecological, and cultural value (real estate), and as an object for specific use (Auziņš, 2009). In turn, the term "ownership" in the term explanatory dictionary (https://tezaurs.lv) is understood as legal norms that govern affiliation of items to the owners.

Latvian subterranean depths cannot be compared to countries that are rich in natural resources such as Russia or Norway, but it possesses underground waters, sand, gravel, clay, dolomite, gypsum, limestone, amber, possibly diamonds, iron ore and petroleum deposits that have become an apple of discord within last ten years (Gavena, 2001).

The process of the use of beneficial properties of subterranean depths in Latvia has not been widely used in the country so far, because no energy resources or other chemical elements in Latvia, were widely obtained, or, for example, geothermal heat, was not used, because there has not been a sufficient public interest and there has not been any sufficient research base on the relevant interests of Latvian subterranean depths, which could be used or industrially developed in the near future, but there is a great potential for transparent future and national economic development.

Comprehension of Subterranean Depths

Ownership of subterranean depths is different from the rights on the use of land considering the actual way of their use. However, looking at the evolution of the concept of ownership of subterranean depths, land laws were originally established and consequently, in the process of development of technology and chances to use the subterranean depths, ownership aspects of subterranean depths started to develop.

Throughout Europe and majority of the world, with an exception of the US, people have realised that wealth of subterranean depths, which has not been fully comprehended, is not human made, but it has gradually appeared in each place in the Earth's development process that hs taken millions of years. Minerals have been formed in subterranean depths independently of different administrative or property borders, and to ensure their rational use and protection based on the interests of all national citizens, they should not belong to landowners. Restoring and developing Latvian legislative systems, unfortunately, opinions of geologists and environmental professionals have not been considered; the rule of Civil law of 1937 is still in force, which determines that subterranean depths and all minerals are owned by the landowner. The same legislators, despite the opposition of the association of geologists, kept the same norm in the adopted law of 1996 "On subterranean depths" (Gavena, 2001).

Also, now, in 2021, in Latvia, the ownership of the subterranean depths is stipulated in the Civil Law and in several special sector laws such as the Energy Law, the Law "On subterranean depths". Latvia has introduced a model of ownership when the energy resources in the subterranean depths are owned by such a landowner who owns the surface layer of the land. Such a model is very rare at the level of both the European Union and globally.

Various theories, where the American Law recognises ownership of the Earth's centre can be seen up to 1766, when W. Blackstone declared his famous doctrine on England laws (Commentaries on the Laws of England). Although it was not the principle of law contained in the laws of Rome, despite the used Latin in the word "Maxim", nor it was the theory that was recognised in the early regulations. Rather, it should be perceived as a hyperbole that was made up by W. Blackstone, without any previous basis in English legal acts. While being ignorant of geology of subterranean depths, English and American courts repeated this geocentric theory for decades and often there were cases when rights on subterranean depths were not even the object of disputes. The authors and disciples of scientific works, as well as legal dictionaries took over the geocentric theory, widely using it to help to define the meaning of the word "land", to explain the amount of property rights that were granted with the help of different documents. In the end of the nineteenth century, the frequent repetition of this theory has transformed W. Blakstone's non-argumented claim into an independent legal norm of the American law (Sprenching, 2008).

Over the past centuries, practical functions and land use rights of land and subterranean depths have changed significantly, technologies, which also contribute to

the acquisition and use of subterranean depths not just a primitive use and processing of the land surface, have developed.

The idea that the landowner has also become the owner to heaven for corresponding period could be a hyperbole of harmless theory, until it began to threaten development of the aviation industry. Given today's modern scientific knowledge and new achievements in subterranean depth technologies, an equally foolish view can be encountered that the landowner can also call themselves the owner of the earth's central part, including the earth's molten core part. Without the written rights or general logic support, such a theory nowadays is just a strange relic from past times (Sprankling, 2008).

Unlike with land, there is no doctrine of personal property. The reason is that property doctrine is rooted in feudalism. In addition, at a time when the doctrine was developed, there was no requirement for other things as for the land, namely that the law would facilitate transactions over the time. Indeed, the purchase and sale of daily items would be devastatingly disturbed if the law recognised that it can be invisibly exposed to a number of interests of this kind (Burrows & Feldman, 2017).

The starting point is that the person's interests, for example, for a car or a coat are uniform and indivisible, namely, the rights to their exclusive belonging for a lifetime. In relation to land, these rights include the term "ordinary fee". It must be admitted, though, there is no similar proportional term for equivalent goods. Some use the word "property", others – "ownership", although neither is suitable. It is better to have the title that is obtained from the rights – the rights are such rights to the exclusive item that are in force in relation to it forever. Such a title is often a grossly abused word and is applied in relation to the interests that give its holder the rights to other items that are not in their exclusive possession. For example, sometimes it is a word that is suitable for debts which are not an ownership at all. In order to help to think clearly, its use is limited to exclusive item management rights. And as far as it refers to goods, it is the only title that can be used without any time limit. Thus, it is being said that "a present for one hour is a present for life" (Burrows & Feldman, 2017).

Rights as a way of exercising power over the Earth is a solution of legal type and nature, on how to determine boundaries so that people can develop during their lifetime in a certain unit of land, which existed and will still exist for millions of years. Thus, the ownership of land and subterranean depths cannot be attributed to the same value as ownership, for example, to personal property.

Although the exact unit of land depends on relevant rights, these rights, for a better understanding of the term, can be called "quasi-ownership", as they only have provisional or incomplete characteristics which are usually associated with property in a particular land area. However, many rights in this category have at least one of the attributes of ownership, namely, they include the rights to land that have different land ownerships. Most of these "quasi-property" rights include public rights which everyone can exercise regardless of whether they own the land, just because they are a member of a particular association. Some public rights are similar to profit a prendre (for example, public rights to fishing). Other public rights are similar to easements (for example, public rights in

relation to highway). However, the rights of all society differ from easements because they do not provide for a dominant rent and a special grant is never given to any individual (Gray K. J., Gray S. F., 2005).

Land is a word with a very broad meaning. The breadth of the meaning of this word is reflected in a number of definitions set out in English legislation, which, although far from the uniform or consistent definition, points to a surprisingly versatile understanding of the term "land" in English legal acts. In the basic rules of the English law, contained in the 1925 general legislation, "land" is described as:

> "Ownership of the land, as well as mines and mineral resources, regardless of surface, building or the parts of the building (horizontal, vertical or any other form) and other material benefits; also manor, rent and other intangible goods, as well as easement, rights, a certain privilege or benefit on the surface of the land or in its depths." (Law of Property Act 1925 (I) (IX)) (Gray K. J., Gray S. F., 2005)

It can be seen that in the early 20th century, an understanding of ownership and various forms of use for different land units has only began to develop. Such a rapid development also took place because the world's dominant colonies of previous centuries had collapsed, and more and more countries and democratic societies since have developed, and, respectively, more and more people were able to gain ownership of a certain personal property and real estate, which, accordingly, required a certain legal framework to avoid potential disputes and uncertain situations.

Potential of Use of Subterranean Depths

Useful properties of subterranean depths in Latvia have so far not been widely used, as so far neither energy resources nor other chemical elements have been widely obtained there, or there has not been used geothermal heat, for example, because of the lack of public interest, economic incentive, and there is insufficient study base on valuable properties of Latvian subterranean depths that could be used for the purposes of economic development. Consequently, legal framework in relation to the use of subterranean depths has not been practically used in Latvia so far, and, it has led to a situation when the first discussions arise; society has already reached the level of misunderstanding and conflicts and come to various interpretations. However, as can be seen from Figure 1, there is actual potential of geothermal energy in Latvia, and it would be necessary to improve legal framework to ensure better research and potential extraction.

Technology is developing, and mining of ore that was not known before because of the strategic location of Latvia is becoming possible and beneficial; however, legal framework is yet to be established, created at the same time with a Jules Verne Book "Journey to the Center of the Earth", to also meet the progress. For example, Finland has set a modern regulation of mineral mining, advertising itself as one of the best places for use of subterranean depths in Europe. Such a possibility is there in Latvia as well, the question is whether this opportunity will be used (Pastars, 2017).

In Latvia there are several groundwater horizons that can be used to supply heat and hot water, agriculture, fisheries, and balneology. The most significant geothermal resources (earth heat) for practical use are associated with groundwater in Cambrian and Devon-age sediments. The temperature of the groundwater in these sediments is determined mainly by the intensity of the Earth's internal underground heat flow, which is very different in the various regions of Latvia (see Figure 1). The highest ground water temperature (marked in more red color in Figure 1) has been found to be in Cambrian sediments in the south-west of Kurzeme region, as well as in the neighborhood of Eleja-Jelgava.

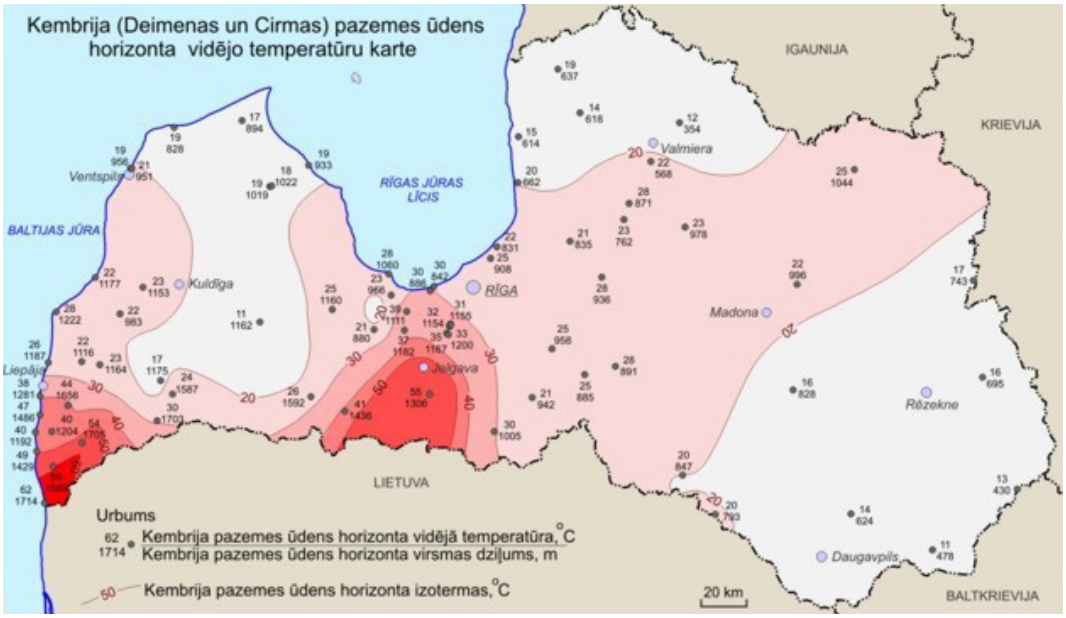

Figure 1. Potential for geothermal resources in Latvia (source: Latvian Environment, Geology and Meteorology Centre)

The ownership rights on subterranean depths in Latvia are stipulated in the Civil Law and several special sector laws, namely, the Energy Law, Law "On subterranean depths". Latvia has introduced a model of ownership when energy resources in subterranean depths are owned by the land owner who owns the surface layer of the land. Such a model is very rare in the European Union.

Article 1042 of the Civil Law provides that the land owner owns not only the surface of the land, but also the airspace above it, as well as the layers of the land that are under it and all the minerals which are in them. In turn, Article 1043 of the Civil Law determines that the land owner may, at his own discretion, manage the land's surface, the airspace above it, as well as the layers of the land underneath it on his own, unless those actions

affect foreign borders. The first part of Article 3 of the Law "On subterranean depths" determines that subterranean depths and all minerals in them are owned by the landowner.

Subject to the rules contained in the Civil Law, components of the land plot (land area) are:

1) subterranean depths and Minerals (Article 1042 of the Civil Law);
2) buildings that are tightly bonded with the land (Article 968 of the Civil Law);
3) trees and other plants that lay their roots in the ground, sown seed (Articles 973 and 976 of the Civil Law);
4) newly emerged island, seabed, and alluvial deposit (Article 960 of the Civil Law) (EN Portal, October 2017).

Legal affiliation of subterranean depths and minerals in the territory of Latvia has been unchanged at least since the 19th century. Article 1042 of the Civil Law is the same as Article 877 of the Baltic states civil law collection. This legal norm is interpreted that without the consent of the land owner, any actions in subterranean depths are unacceptable, regardless of the depths in which they are carried out (Bukovskij, 1914). On the other hand, in the doctrine of law there is an indication that the rights to subterranean depths are attributable directly to minerals that are inside them not on subterranean depths at all (Tjutrjumov, 1927). In addition, it is emphasised that "the essence of the land owner's rights is to ensure his rights to the content of the subterranean depths only to the extent that the opportunities can reach to act on them" (Tjutrjumov, 1927).

In contrast, soviet civil laws on cases that are withdrawn from overall circulation considered land, its depths, waters, and forests as the property of the land owner (Vebers, 1979; Grutups & Kalnins, 2002).

As is follows from the literal meaning of Article 1042 of the Civil Law, the owner of the land plot owns not only the surface of the land (by which, *inter alia*, the soil and surface waters are defined), but also the "air pole" above this land plot and "land cone" that extends from the land surface to the centre of the land (Sinajskij, 1926). Based on this understanding, the legal literature recognises that the Civil Law "does not recognise the limits of height or depth" (respectively, vertical borders), and in the case if any owner would have an interest in defending his rights at a high height or depth, according to the Civil Law, it is always possible" (Čakste, 1937). However, every subjective right means not only legal, but also physical possibility of using this right (Sinajskij, 1926; Sinaiskis, 1935). In addition, the purpose of subjective right is to meet (protect) certain interests; in addition, this purpose has a decisive role in determining the limit of the use of particular right (crox. Brox, RN 571; Larenz / Wolf, § 14 RN 18 f) (Grutups & Kalnins, 2002).

It can only be concluded that after reinstating Latvian independence on May 4, 1990, the Civil Law, including the legal framework in relation to the ownership of subterranean depths required significant modernisation, since more than 50 years had passed since the Civil Law had entered in force on 1 January 1938, but the Civil Law was reinstated in its historical version, sequentially resulting in conflicts, taking into account

the values of the modern society and opportunities of perspective use of technological equipment.

The regulation of the Latvian Civil Law has not developed over time and has not been adapted to modern trends. Approach of the Civil Law in the issue of property's physical unity, as well as lack of regulation of the law "On subterranean depths", which is also influenced by the Civil Law's approach to the issue of subterranean depths, is an important obstacle to attracting investment for the research and extraction of the minerals. Therefore, the regulatory framework should be improved to provide opportunities for modern and economically efficient development of the mining sector (Cabinet of Ministers of the Republic of Latvia, 2016).

National legal science and practice of such a small nation as Latvia will never be sufficiently large enough to create a base for serious, deep jurisprudence in all spheres of the law. Therefore, Latvian authorities and judicial practice (as prior to 1940) should follow the model of other small nations and should not only use national law science and legal reports in its daily work, but should also be connected to large national systems with a wide range of traditional science and practice (Levits, 1998).

Unique or outdated are some of the assessments of the Latvian existing regulatory framework, according to which land owners own all subterranean depths even to the centre of the land (earth). It is possible that amendments to the regulatory enactments will take place soon, which will determine restrictions on the rights of use of subterranean depths in case of the research (LV portal, November 2017).

Modern private rights on ownership of natural resources are increasingly narrowing in favour of the overall public interest. Individual rights on the use of land or acquirement of mineral resources have no more advantage over the general public interest in protection of the environment (Mcharg, et al., 2010).

With the development of the nation and society, its consumption and demands on energy resources and energy to meet different national economy needs, increase. In recent years, the issue of energy independence for the European Union and, in particular, Latvia has become relevant considering both the global energy market trends and the Ukrainian-Russian crisis, which created negative indications on provision of national energy needs and energy independence as a whole.

Research of local resources and assessment of mineral resources is very important for development of national economy. This information is very necessary not only for development of existing mineral processing industry, but also to introduce new technologies through researched mineral resources. Only in this way their full and rational use is possible. The further research and economic evaluation of new minerals, including energy resources (oil, thermal water, peat fuel) is also important (Latvian Environment, Geology and Metrology Center, 2021). In order to effectively obtain and qualitatively process such an information on existence of potential resources in subterranean depths would require such a legal framework in Latvia that would allow such research

of subterranean depths also in real estate of other persons. Information in Figure 2 shows that peat potential in Latvia is progressive with a significant opportunity to be developed.

In Figure 2 appears that peat potential in the Republic of Latvia is progressive with a significant opportunity to develop it. There have been a lot of potential peat harvesting sites throughout the Latvia territory, mainly in the south-east of Latgale region.

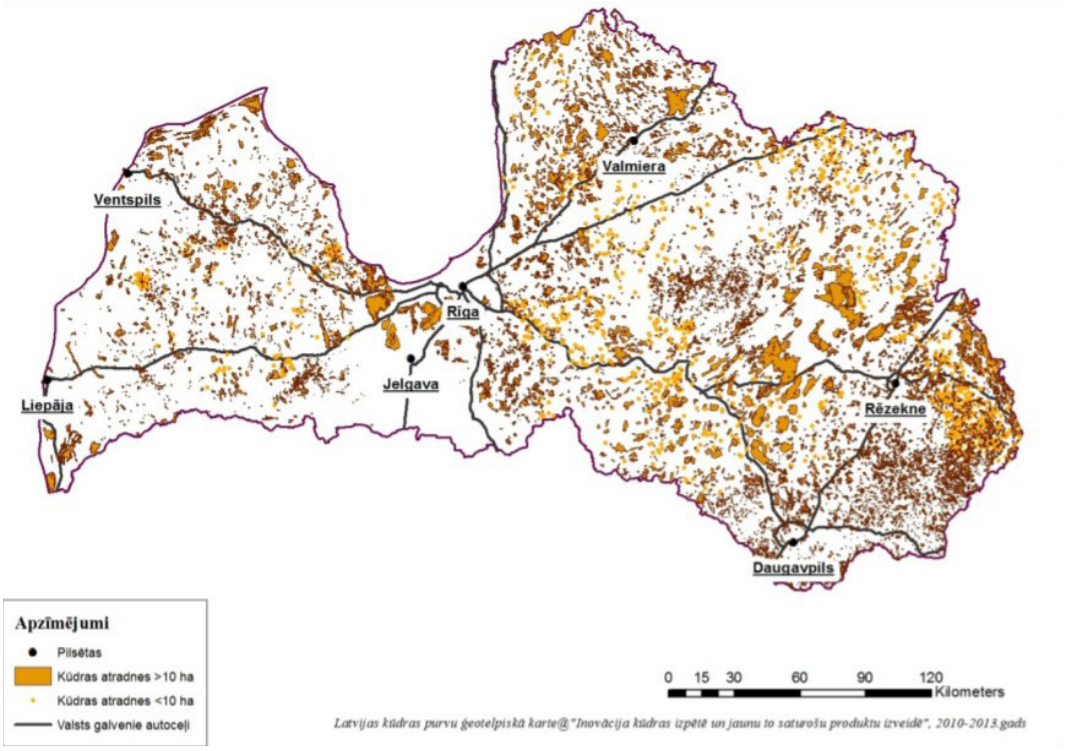

Figure 2. Latvian peat resources (source: Project "Latvian peat deposit data quality analysis, preparation of recommendations for improvement and use in the preparation of national strategy's basic documents" results)

Challenges of Legal Scope of Subterranean Depths

Regarding the use of subterranean depths in Latvia, there is a peculiar situation; according to the Civil Law, subterranean depths, including mineral resources, belong to the land owner. However, to ensure sustainable use of resources, the government determines its own requirements. Using the regulation of the Law "On subterranean depths", the Law "On Environmental protection" and other regulatory enactments, a compromise between the interests of land owners, development needs and environmental protection

requirements is being achieved (Ministry of Environmental Protection and Regional Development of the Republic of Latvia, 2021).

Property rights as human rights are part of international laws. In national laws, they are a part of public laws, including constitutional laws. This means that property rights as human rights include general theoretical and dogmatic knowledge of both international laws and national laws. The international historical development of property rights shows that the right to property in international laws is primarily localised in contract laws, but they may also be found in customary laws and general law principles. In national laws, they are mainly found in the composition of public laws, including the composition of constitutional laws (Article 105 of the Constitution (*Satversme*) of the Republic of Latvia) (Neimane, 2005).

The right to property as a development of the human rights is one of the most important prerequisites for the property rights that are guaranteed by Article 105 of the Constitution and the European Convention on Human Rights to be practically applied and to become the practical rights in Latvia. The main function of human rights is to provide human rights toward the government. So, they are the rights of an individual to require some certain course of action from the government (Neimane, 2005). Thus, it can be understood that ownership nowadays is developing an increasingly closer comprehension also in the context of general human rights.

Some human rights are not subject to restrictions from the state. They are absolute human rights which must not be restricted under any circumstances (for example, rights on life). However, most human rights, including the right to property, must be reasonably limited to harmonise the various rights of many individuals (Neimane, 2005).

In democratic, legal, liberal state and in general human rights theories of public apparatus, institutional and judicial task is to form the human rights in a way to preserve the highest possible individual room for freedom with least restrictions and thus prevent the individual human rights' conflicts with common interests and other individuals' human rights (Neimane, 2005).

The state can restrict a large part of human rights, including the right to property. Such public powers are contained in the human rights system itself. Restrictions imposed by the state are legal only if they are within the limits of these mandates that are named as The *limits of human rights limits in* the *general theory of human rights* (Neimane, 2005).

Although ownership is inviolable, the state may restrict it, while such restrictions can only be regarded as legal only if they are within the limits of these mandates that are named The *limits of human rights limits in* the *general theory of human rights*. The same principle of ownership can be attributed to the principles of land property and determining the ownership of subterranean depths. In order to ensure that the state does not violate the permissible mandates of restrictions on property rights, and, consequently, to ensure effective implementation of human rights in property laws, the legal state must provide following three functions:

1) create a criterion to determine the limits of how far the country may restrict the property rights. Initially, it is the task of the legislator. The Latvian legislator has set such criteria in Article 105 of the *Satversme*, and its appropriate interpretation guarantees that the country adheres to the human rights limits. However, the criteria set in Article 105 of the *Satversme* contain only such guidelines that can be interpreted with the interpretation methodology;
2) organise state activities in a way to observe the specific boundaries of human rights theory and dogma in its action without violating its authorised mandates of restrictions on human rights in the field of property rights;
3) ensure an effective mechanism for contesting the state's action in protection of property rights (Neimane, 2005).

Observing the general human rights theory, checking whether the state-specific restriction of property rights is justified, should be carried out in three logical steps (Neimane, 2005):

1) determination of the rights to the content of property (which is protected);
2) determination whether national action is qualified as infringement of property rights;
3) ascertaining whether infringement of property rights is justified.

The basic principles of public laws of national legal apparatus, which also prevail in the comprehension of the European Convention on Human Rights, are proportionality, equality and the principle of prohibition of discrimination or the principle of legitimate expectation, the principle of legal defense, the principle of legality, the principle of efficiency, etc. (Neimane, 2005).

The principles of law are derived from the written norms which specify the content of the written norms more closely, and, in turn, where the written norms have left white spots, they act as a direct and unmediated source of law that institutions and courts apply in the same manner as regulatory enactments. The principles of law in mutual interaction are developed both in legal practice and legal science (Levits, 2000).

The state has an obligation to respect property rights as well as human rights. It is determined by Article 89 of the *Satversme*. This constitutional norm is applicable on the entire Latvian state authority – legislator, executive, and judiciary. It includes human rights regardless of their location in the *Satversme*, laws or Latvian contracts and gives them a constitutional rank (Levits, 2000).

The task of the state is to organise its work not violating the property rights and so that these rights would become self-realizing in the daily practice of a country. If the state is unable to provide a person's right to property, protection of its rights also follows from the first Article of the first protocol of European Convention on Human Rights. It is therefore important to know and be able to correctly apply the translation of the first Article of the first protocol of European Convention in accordance with the practice of the European Court of Human Rights that is related to the protected spectrum of property and state

intervention permissible criteria (Neimane, 2005). Consequently, the country must have determined clear action and legal framework in relation to ownership aspects, including those relating to subterranean depths and restrictions on the use of subterranean depths.

There is no strategy for the use of subterranean depths in Latvia in national and municipal lands. There are no systematic actions on the search and research of new mineral resources and other subterranean depth resources, as well as additional research work on known mineral deposits, to provide their more rational use (Ministry of Environmental Protection and Regional Development of the Republic of Latvia, 2013).

In 2016, the concept of improvement of the legal framework for use of subterranean depths to attract potential investments was enacted. All these years the work to improve the regulatory framework and encourage the more efficient use of subterranean depths and involvement of land owners in their research has continued. The *Saeima* (the Parliament of the Republic of Latvia) completed the work on amendments to the Law "On subterranean depths" in 2021 (*Saeima* of the Republic of Latvia, 2021). The law is complemented by a new term – geological research of national importance – determining that its aim is to obtain important information on the geological structure of the territory, geological processes and minerals that can play a particularly important role in national economy, defense, and other areas. Currently, any actions of the use of subterranean depths are directly dependent on the land owner, so that geological mapping or other research works are often not possible. The investor or scientific institution must agree with each land owner on the use, exploration, or mining work of minerals even before the license for the use of subterranean depths has been received, state the authors of the amendments. The geological mapping that was carried out in the second half of the last century shows that mineral resources that are potentially available in Latvia include hydrocarbons, different metal ores, and others that are located not only in sedimentary rocks but also in the ancient crystal platform. Prospective mineral resources require additional detailed research, so was stated in the assessment report (annotation) on initial impact of the Law "Amendments to the Law "On subterranean depths"".

The stated documents (annotation and legal norms contained in recent amendments to the Law on the subterranean depths) lead to a conclusion that, although the legal framework has been improved and should contribute to the provision of geological research in Latvia, the land owner will still have legal opportunities to delay the research of subterranean depths and extraction of minerals, which would not be in the interests of the national economic development and general public.

Conclusions

The principle of the Civil Law that the person who owns the land owns everything that extends even to the sky and depths of the earth has originated in a medieval era and it would be necessary to modernize the legal norms contained in the Civil Law and determine that subterranean depths belong to the Republic of Latvia as a legal entity.

Nowadays, when the public demand for energy is growing rapidly and technologies are increasingly developing, it is important to separate the overall interest and private legal interest in energy resources and minerals in subterranean depths to ensure the well-being of the public, and that energy resources could be gained in an increasingly economical way.

In the 21st century, the Latvian legal framework in relation to the ownership of subterranean depths has not introduced relevant legal framework to meet the needs of modern society and technological opportunities, to consequently make quality performance both on the search of new minerals and other subterranean depth resources and systematic research works, and already identifying them, and, accordingly, a state-level strategy on the use of subterranean depths would be developed.

Although the *Saeima* in the early 2021 has completed the work on amendments to the Law "On subterranean depths" and those have entered into force, which will improve the legal situation in the issues of subterranean depths, it would be necessary to perform more conceptual and radical changes in the Latvian legal framework in relation to subterranean depths and their useful properties.

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